

OVER THE RAINBOW

EUROPEAN AND AMERICAN CONSUMER PROTECTION POLICY AND REMEDY CONFLICTS ON THE INTERNET AND A POSSIBLE SOLUTION

by

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A. The Need for Convergence

Like an Emerald City “over the rainbow,” the Internet ephemerally exists between here and there, bringing e-business in contact with the e-consumer. Yet, unlike a dream, many e-consumers wake up to real harm from on-line activities – fraudulent business-practices, unperformed expectations, adhesion contracts, etc. All parties agree that the e-consumer represents an important policy factor affecting Internet confidence and e-commerce; yet, this is all they agree about.¹

The biggest players, the European Union [“EU”] and the United States [“US”], have both addressed Internet consumer protection from differing policy stances. The net-effect is that e-commerce has become a tangled web of policy, regulations and unforeseeability – an area ripe for e-consumer harm. To best approach e-consumer protection, the EU and US must converge their interests into a workable coherent system that will bring forth a paradigm shift benefiting both e-businesses and e-consumers alike. To achieve e-consumer protection, this paper advocates a governmentally-enforced self-regulatory regime based on “convergent” mandatory codes of conduct, that incorporate both e-business and e-consumer interests, and technical blocking mechanisms incorporated into e-commerce technologies to further these protections.²

¹ See Donna M. Lampert, et al., *Overview of Internet Legal and Regulatory Issues*, 544 PLI/Pat 179, 185 (Dec. 1998).

² While state consumer protection laws most likely apply to Internet sales of goods and services, this paper addresses mainly US federal and EU policies and actions. While important to consumer protection, this paper does not address Internet spamming, language requirements, privacy, data protection, e-signatures, personal jurisdiction, data transfers outside of the EU and US, debit and credit cards, Internet taxation or e-money as a payment method. See *Minn. v. Granite Gate Resorts, Inc.*, No. C6-95-7227, 1996 WL 767431 935, n.155 (Minn. Dist. Ct. Dec. 11, 1996), *aff'd*, 568 N.W.2d 715 (Minn. Ct. App. 1997), *aff'd*, 576 N.W.2d 747 (Minn. 1998); Written Question No. 565/98 by Karla PEIJS to the Comm’n. Effective Legislation Against Fraud Involving Non-cash Means of Payment, 1998 OJ (C 304) at §1.3.1; Resolution on the Communication from the Comm’n to the Eur. Parl., the Council, the Eur. Central Bank and the Economic and Social Comm.: A Framework for Action on Combating Fraud and Counterfeiting of Non-cash Means of Payment (COM(98)0395 C4-0455/98), 1998 O.J. (C 379) at 37; Mark Owen, *Int’l Ramifications of Doing Busi-*

B. E-Commerce and Consumer Protection Policy Issues

I. E-Commerce Growth

Global electronic commerce, driven by the development of the Internet, will be an important engine for growth in the world economy in the 21st century. Electronic commerce offers considerable new opportunities for business and citizens in all regions of the world.³

The Internet⁴ has taken many by surprise⁵ allowing a new globalized⁶ information and commercial revolution.⁷ By allowing millions⁸ to “shop, bank, work, and study from home, as

ness Online: Europe, 564 PLI/Pat 263, 280-284 (June 14-15, 1999); Eric Fisher, *U.S. Will Take Close Look at E-selling*, Wash. Times, Feb. 6, 1999, at C1, available at 1999 WL 3077376; Jennifer Tallarico, U.S. Dep't of Commerce *Info. Services and Elec. Commerce*, at ¶ 3 (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/24.htm>>; Pamela Barnett, *E-Signature Bill Hits Obstacle Over Consumer Concerns*, Congress Daily, Aug. 12, 1999 (Pg. Unavail. Online), available at 1999 WL 18801652; John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 933-4 (Summer 1999); Courtney Macavinta, *U.S. Privacy Policy Trailing Behind*, CNET News.Com (last visited Jan. 21, 2000) <<http://news.cnet.com/news/0-1005-200-340963.html?tag=st.cn.1.>>; *Mandate Privacy Policies*, CNET Coverage, (last visited Jan. 20, 2000) <<http://coverage.cnet.com/Content/Features/Dlife/Laws10/ss04.html>>; Reuters, *U.S.-EU Privacy Agreement Doubtful*, CNET News.com, (last visited Jan. 20, 2000) <<http://news.cnet.com/news/0-1005-200-343101.html?tag=st.cn.1.>>; *No New Taxes*, CNET Coverage, (last visited Jan. 20, 2000) <<http://coverage.cnet.com/Content/Features/Dlife/Laws10/ss09.html>>; *Ban Spam*, CNET Coverage, (last visited Jan. 20, 2000) <<http://coverage.cnet.com/Content/Features/Dlife/Laws10/ss02.html>>; Bloomberg News, *Digital Signatures, Anticybersquatter Bill Approved*, CNET News.Com, (last visited Jan. 20, 2000) <<http://news.cnet.com/news/0-1007-200-852007.html?tag=st.cn.1.>>; and *Internet Purchases are Safer Than Phone, at Least for Now*, The Orange County Register, Aug. 22, 1999, at K05, available at 1999 WL 4315903.

³ Am. Soc'y of Int'l Law, *Eur. Union – United States: Joint Statement on Elec. Commerce*, 37 I.L.M. 667 (1998), available at (last visited Sept. 12, 1999) <<http://www.europa.int>>.

⁴ The Internet is based upon various electronic communication mechanisms including world-wide-web sites, electronic mail, news groups, chat rooms, electronic bulletin boards and on-line services. See *ACLU v. Reno*, 929 F. Supp. 824, 834, 836-8 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997); *Weber v. Jolly Hotels*, 977 F. Supp. 327, 333 (D.N.J. 1997); *Agar Corp. v. Multi-Fluid, Inc.*, No. 95-5105, 1997 U.S. Dist. LEXIS 17121 (S.D. Tex. June 25, 1997); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); Opinion of the Economic and Social Comm. on the 'Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions: A Eur. Initiative in Elec. Commerce, 1998 O.J. (C 019) at 72, 1.4.5; John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 899, 900-3 (Summer 1999); Jennifer Tallarico, U.S. Dep't of Commerce *Info. Services and Elec. Commerce*, at ¶¶ 3, 8, 9 (last visited Sept. 12, 1999). <<http://www.ecommerce.gov/24.htm>>; see also The FTC on 'Internet Fraud' Before the Subcommittee on Investigations of the Gov'tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 2 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; Michael Krantz, *Click Till You Drop*, Time, July 20, 1998, at 34, 38.

⁵ Donna M. Lampert, et al., *Overview of Internet Legal and Regulatory Issues*, 544 PLI/Pat 179, 185 (Dec. 1998).

⁶ See U.S. Dep't of Commerce, *Joint US-Ireland Communiqué*, at ¶ 1 (last visited Sept. 12, 1999) <<http://www.doc.gov/ecommerce/irusfnl.htm>>; see also FTC, *Elec. Commerce and the OECD* (last visited

well as an almost endless array of entertainment and information alternatives,”⁹ the Internet¹⁰ has changed “the way we learn, conduct financial transactions, socialize, entertain, interact with

Sept. 12, 1999) <<http://www.ecommerce.gov/14.htm>> (discussing globalization of the Internet industry in the past two decades).

⁷ See Donna M. Lampert, et al., *Overview of Internet Legal and Regulatory Issues*, 544 PLI/Pat 179, 185 (Dec. 1998); Patricia Brumfield Fry, *Laying Foundation for Electric Commerce the Uniform Elec. Transaction Act*, 790 PLI/Comm 205, 207-8 (1999); Jennifer Tallarico, U.S. Dep’t of Commerce *Info. Services and Elec. Commerce*, at ¶ 3 (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/24.htm>>; Bob Tedeschi, *Electronic Retailing to a Truly Mass Market is Expected*, New York Times, Dec. 20, 1999 (last visited Jan. 20, 2000) <<http://www.nytimes.com/library/tech/99/12/biztech/articles/122099outlook-tedd.html>>; see also Directorate-General XIII, Telecommunications, Info. Mkt. and Exploitation of Research, Communication from the Comm’n to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions, *The Need for Strengthened Int’l Coordination* (COM (98) 50, § 2.1, at ¶ 8 (last visited Sept. 12, 1999) <<http://www.ispo.cec.be/eif/policy/com9850en.html>>; White House, *A Framework for Global Elec. Commerce*, at ¶¶ 1 (discussing how the Global Info. Infrastructure will affect everyday life) at 2 (discussing how the Internet has changed society) (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/framework.htm>>.

⁸ See *Telecommunications: ITU Report Tracks Growth and Dev. on the Internet*, Tech Europe, Oct. 7, 1997, at No. 130, at ¶ 3; Robert Burns, *Clinton Promotes Interstate Commerce*, The Orange County Register, Dec. 1, 1998, at C03, available at 1998 WL 21282235; *Clinton Lends Support to Ecom Steps Include Push Against Net Fraud*, Chic. Trib., Dec. 1, 1998 (Pg. Unavail. Online), available at 1998 WL 2921497; see also The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 5 (last visited Sept. 12, 1999) <<http://www.ftc.gov>> (describing the percentage of millions of consumers shopping on the Internet); Charles R. Topping, *The Surf is Up, But Who Owns the Beach? – Who Should Regulate Commerce on the Internet?*, 13 Notre Dame J.L. Ethics & Pub. Pol’y 179, 192-3 (1999); Charles R. Topping, *The Surf is Up, But Who Owns the Beach? – Who Should Regulate Commerce on the Internet?*, 13 Notre Dame J.L. Ethics & Pub. Pol’y 179, 192 (1999); Jennifer Tallarico, U.S. Dep’t of Commerce *Info. Services and Elec. Commerce*, at ¶ 3 (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/24.htm>>; Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887 (Summer 1998); G. Christian Hill, *Adult Net Users in U.S., Canada Put at 58 Million*, Wall St. J., Dec. 11, 1997 at A11 (describing Internet growth and e-consumer use); John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 895-6 (Summer 1999) (discussing the lure that the Internet has for businesses); Robert MacMillan, *FTC Plans Ecom Safety Workshop*, Newsbytes, Dec. 14, 1998 (Pg. Unavail. Online), available at 1998 WL 20720237 at 23 (discussing the number of Am.s on-line and the resulting ecom methods); *Eur. On-Line Services Mkt. Worth USD6 Billion in 2002*, Eur. Report, May 24, 1997, at No. 2226.

⁹ Ilene Knable Gotts, et al., *Dev.s in Consumer Protection: Enforcers Get Tough on Fraudulent and Deceptive Practices in Telecommunications Services*, 11-SUM Antitrust 39 (1997); see Proceedings and Debates Regarding Congress and the Internet, In House of Representatives, 105th Congress, 2nd Sess., 144 Cong. Rec. E223-02 (Feb. 25, 1998) (statement of Hon. Lee H. Hamilton of Indiana), available at 1998 WL 77700 (Cong.Rec.); White House, *A Framework for Global Elec. Commerce*, at ¶ 5 (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/framework.htm>>; William M. Daley, U.S. Secretary of Commerce, *The Administration’s Position on Elec. Commerce: Let Mkts., Not Regulations, Define How Elec. Commerce Matures* (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/16.htm>>; see also John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 896 (Summer 1999) (describing the wide range of goods and services and consumer benefits the web provides); and Charles R. Topping, *The Surf is*

our governments and communicate”¹¹ and offers “enormous potential benefits to consumers.”¹² Internet buying and selling, e-commerce,¹³ have created a simulated playing field by having “every business in the world side-by-side on Main Street,”¹⁴ increasing efficiency and lowering costs.¹⁵ Thus, the web attracts businesses like flies.¹⁶

In this emerging digital marketplace nearly anyone with a good idea and a little software can set up shop and then become the corner store for an entire planet.¹⁷

In both the EU and US, e-commerce activity increases steadily at exponential rates. In the US, this burgeoning marketplace¹⁸ of “cyber malls”¹⁹ and “passive advertising”²⁰ has created an

Up, But Who Owns the Beach? – Who Should Regulate Commerce on the Internet?, 13 Notre Dame J.L. Ethics & Pub. Pol’y 179, 189 (1999).

¹⁰ Office of the Press Secretary, White House, *Text of the President’s Message to Internet Users*, July 1, 1997 (last visited Sept. 12, 1999) <<http://www.whitehouse.gov/WH/New/Commerce/message.html>>.

¹¹ Donna M. Lampert, et al., *Overview of Internet Legal and Regulatory Issues*, 544 PLI/Pat 179, 185 (Dec. 1998); see also Directorate-General XIII, Telecommunications, Info. Mkt. and Exploitation of Research, Communication from the Comm’n to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions, *The Need for Strengthened Int’l Coordination* (COM (98) 50, at § 2.1, ¶ 8 (last visited Sept. 12, 1999) <<http://www.ispo.cec.be/eif/policy/com9850en.html>>.

¹² Ilene Knable Gotts, et al., *Dev’s Consumer Protection: Enforcers Get Tough on Fraudulent and Deceptive Practices in Telecommunications Services*, 11-SUM Antitrust 39 (1997); see also John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 896 (Summer 1999) (describing the wide range of goods and services and consumer benefits the web provides); Patricia Brumfield Fry, *Laying Found.s for Electric Commerce the Uniform Elec. Transaction Act*, 790 PLI/Comm 205, 207 (1999); and Jennifer Tallarico, U.S. Dep’t of Commerce *Info. Services and Elec. Commerce* (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/24.htm>>.

¹³ Jennifer Tallarico, U.S. Dep’t of Commerce *Info. Services and Elec. Commerce* (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/24.htm>>; see Opinion of the Economic and Social Comm. on the ‘Communication from the Comm’n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions: A Eur. Initiative in Elec. Commerce, 1998 O.J. (C 019) at 72, 1.2.3.

¹⁴ William M. Daley, U.S. Secretary of Commerce, *The Administration’s Position on Elec. Commerce: Let Mkts., Not Regulations, Define How Elec. Commerce Matures* (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/16.htm>>.

¹⁵ *Id.*; see also Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887, 890 (Summer 1998).

¹⁶ *Id.*; see *The SG Cowen/Datamation Networked Computing Survey*, Oct. 28, 1999 (last visited Oct. 28, 1999) <<http://www.datamation.com/staff/9909cowen5.html>> (showing surveys of business activity on the Internet); Reuters, *Study: Net Businesses Growing Wildly*, Oct. 27, 1999 (last visited Oct. 27, 1999) <<http://www.msnbc.com/news/328213.asp>>; see also John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 895-6 (Summer 1999).

¹⁷ Clinton Administration Pushes For Better Protection Against Cyber-fraud, *J. Rec.*, Dec. 1, 1998 (Pg. Unavail. Online), available at 1998 WL 11962162.

¹⁸ See White House, *A Framework for Global Elec. Commerce*, at ¶ 5 (last visited Sept. 12, 1999)

interactive “cross between catalogue sales, window shopping, and browsing the Yellow Pages.”²¹ With e-commerce giants like Dell Computers,²² Auto-by-Tel,²³ On-line Entertainment,²⁴ Yahoo,²⁵ eBay,²⁶ Shopping.com,²⁷ Biddingtons,²⁸ Onsale,²⁹ Harlequin³⁰ and Amazon.com,³¹ e-commerce activity will soon be measured in trillions,³² rather than today’s billions.³³ From adver-

<<http://www.ecommerce.gov/framework.htm>>; The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 2 (last visited Sept. 12, 1999) <<http://www.ftc.gov>> (describing the advent of the Internet, historical development of phones and televisions and what how innovations have benefited business and consumers, to allow well-informed purchasing decision-making).

¹⁹ Dee Pridgen, *How Will Consumers Be Protected on the Info. Superhighway?*, 32 Land & Water L. Rev. 237, 242 (1997)

²⁰ Charles R. Topping, *The Surf is Up, But Who Owns the Beach? – Who Should Regulate Commerce on the Internet?* 13 Notre Dame J.L. Ethics & Pub. Pol’y 179, 189 (1999).

²¹ Dee Pridgen, *How Will Consumers Be Protected on the Info. Superhighway?*, 32 Land & Water L. Rev. 237, 242 (1997).

²² Robert J. Hawkins, *Taking Care of Business : Net Shopping Ready to Explode as Security Fears Fade*, San Diego Union & Trib., Feb. 10, 1998, at 4(10).

²³ *Id.* at ¶ 11.

²⁴ *Id.*

²⁵ *Id.* at ¶ 13.

²⁶ See *Going, Going, Virtually Gone: The Success of Online Auctions in the US Such as eBay has Prompted the Rise of Eur. Auctioneers Who Want to Emulate its Model*, Bus. & Fin., June 17, 1999 (Pg. Unavail. Online) at ¶ 3, available at 1999 WL 9925711.

²⁷ *Am. Interactive Media and Shopping.com Announce Strategic Mktng Agreement*, PR Newswire, Jan. 27, 1999.

²⁸ Gina Smith, *Will Shopping Malls be Going, Going, Gone?*, S.F. Examiner, Oct. 11, 1998, at C5, available at 1998 WL 5192456.

²⁹ *Id.*

³⁰ *Id.*

³¹ Aaron Schavey, U.S. Dep’t of Commerce, *Today’s Promise and Tomorrow’s Opportunity*, at ¶ 4 (last visited Sept. 12, 1999) <<http://www.doc.gov>>.

³² See *Cyberspace Law* (last visited Sept. 12, 1999) <<http://legalnews.findlaw.com/news/19990912/112365640.html>>; *Cyberspace: Who Will Make the Rules? Commerce’s William Daley on Privacy and Taxes*, Bus. Wk., Mar. 22, 1999, at 30D, available at 1999 WL 8226544 at * ¶ 2; see also Pertubuhan Berita, *Internet Sales to Grow to US\$1 Billion by 2003*, Bernama, Sept. 7, 1999 (Pg. Unavail. Online), available at 1999 WL 21723483 (discussing the enormous business sales for Malaysian Internet companies).

³³ See The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 5 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; *Commerce Dep’t to Publish Internet Sales Figures*, L.A. Times, Feb. 6, 1999, at C2, avail-

tising³⁴ and book shipments³⁵ to airline tickets, e-commerce activity has doubled³⁶ or tripled every year.³⁷ In the EU, more than 16 million³⁸ highly interconnected e-consumers buy or sell on the Internet.³⁹ While minor compared to the US, the EU e-commerce market may grow from ECU 7 to 49 billion in 2001⁴⁰ to ECU 300 billion⁴¹ by 2002,⁴² increasing more than “tenfold”

able at 1999 WL 2127347; Bill Pietrucha, *FTC Says Fraud Could Slow Ecom Growth*, Newsbytes, June 26, 1998 (Pg. Unavail. Online), available at 1998 WL 11723668, * ¶ 2; Charles R. Topping, *The Surf is Up, But Who Owns the Beach? – Who Should Regulate Commerce on the Internet?*, 13 Notre Dame J.L. Ethics & Pub. Pol’y 179, 194 (1999); see also *Commerce Dep’t to Publish Internet Sales Figures*, L.A. Times, Feb. 6, 1999, at C2, available at 1999 WL 2127347 (quoting Secretary Daley of the Dep’t of Commerce); Greg Miller, *Clinton Pushes Initiatives for Elec. Commerce*, L.A. Times, Dec. 1, 1998, at C3, at ¶ 2 (discussing White House account of consumer transactions on Internet will reach \$300 billion in a few years); *TO Report on Elec. Commerce*, Tech Europe, Apr. 7, 1998, at No. 136 (discussing that by 2001, there will be 300 million e-consumers for an ecom total valuation of around \$60 billion); Robert J. Hawkins, *Taking Care of Business : Net Shopping Ready to Explode as Security Fears Fade*, San Diego Union & Trib., Feb. 10, 1998, at 4(7)-(9) (stating that ecom transactions in 1997 totaled between \$9-10 billion); and Bobby McGill, *Fraud Watchers Patrol Internet Resources Help Consumers Avoid Online Problems*, Ariz. Republic, Aug. 8, 1999, at D4, available at 1999 WL 4191106.

³⁴ Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 7 (1999); see also *Internet Advertising Bureau Announces Third Quarter Advertising Revenue Reporting Program Results* (visited Sept. 12, 1999) <<http://www.iab.net/news/content/new%20/1211report.html>>.

³⁵ Charles R. Topping, *The Surf is Up, But Who Owns the Beach? – Who Should Regulate Commerce on the Internet?*, 13 Notre Dame J.L. Ethics & Pub. Pol’y 179, 192 (1999).

³⁶ See Lauren Coleman-Lochner, *Retail Scams Lurk Among Cybershopping Sites*, Austin Am.-Statesman, Jan. 19, 1999, at D2, available at 1999 WL 7400043 at * ¶ 8.

³⁷ See Robert MacMillan, *US Will Follow Web Sales And Pursue Self-Regulation*, Newsbytes, Feb. 5, 1999 (Pg. Unavail. Online), available at 1999 WL 5118700 at * ¶¶ 8-9; Louis Trader, et al., *Lessons for Christmas 2000*, Jan. 10, 2000 (last visited Jan. 20, 2000) <<http://www.zdenet.com/ebusiness/stories/0,5918,2418999,00.html>>; see also Eric Fisher, *U.S. Will Take Close Look at E-selling*, Wash. Times, Feb. 6, 1999, at C1, available at 1999 WL 3077376. (noting that on-line sales will triple again if businesses act responsibly).

³⁸ See 1999/168/EC: Council Decision of 25 Jan. 1999 Adopting a Specific Programme for Research, Technological Dev. and Demonstration on a User-Friendly Info. Soc’y (1998 to 2002) Continued from 399D0168 (1999/168/EC), 1999 O.J. (L 64) at 20, 1.1, 3 (discussing number of Eur. ecom users and noting the extremely high numbers of Internet usage in Nordic countries and the quickly accelerating rate of usage in Southern Eur. countries).

³⁹ See *id.* (discussing number of Eur. ecom users and noting the extremely high numbers of Internet usage in Nordic countries and the quickly accelerating rate of usage in Southern Eur. countries).

⁴⁰ See *id.*

⁴¹ 1999/168/EC: Council Decision of 25 Jan. 1999 Adopting a Specific Programme for Research, Technological Dev. and Demonstration on a User-Friendly Info. Soc’y (1998 to 2002) Continued from 399D0168 (1999/168/EC), 1999 O.J. (L 64) at 20, §1.2.

⁴² See Directorate-General XIII, Telecommunications, Info. Mkt. and Exploitation of Research, Communication from the Comm’n to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of

since 1996. As higher EU telephony costs decrease,⁴³ EU e-commerce might outpace US growth.⁴⁴

II. Internet Convergence Requires Policy Convergence

1. Interconnectivity

If e-commerce issues could be wrapped in a box, e-consumer protection would be easily attained.⁴⁵ Unbounded, e-commerce crisscrosses and rebuffs national boundaries,⁴⁶ allowing US e-businesses to exploit EU consumers without breaking laws within US e-commerce jurisdictions, *vis-a-vis*.⁴⁷ The EU and US account for a major percentage of world business and the overall majority of e-commerce⁴⁸ and are of “similar size, prosperity and outlook.”⁴⁹ “Despite occasional differences over bananas and cashmere, trade between them is increasing, to a large extent fuelled by the Internet.”⁵⁰ With this interdependence, it would seem that the EU and US would combine their efforts to create a workable e-commerce and Internet regime⁵¹ to protect

the Regions, The Need for Strengthened Int'l Coordination (COM (98) 50 (last visited Sept. 12, 1999) <<http://www.ispo.cec.be/eif/policy/com9850en.html>> at § 2.1(7); see also *Info. Soc'y: Comm'n Launches Debate on Virtual World*, Eur. Report, Feb. 4, 1998, at No. 2288, at ¶ 5 (discussing the ten-fold increase in Internet usage for Europe).

⁴³ See Directorate-General XIII, Telecommunications, Info. Mkt. and Exploitation of Research, Communication from the Comm'n to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions, The Need for Strengthened Int'l Coordination (COM (98) 50 (last visited Sept. 12, 1999) <<http://www.ispo.cec.be/eif/policy/com9850en.html>> at § 2.3(4); Aaron Schavey, U.S. Dep't of Commerce, *Today's Promise and Tomorrow's Opportunity*, at ¶ 8 (last visited Sept. 12, 1999) <<http://www.doc.gov>>; see also 1999/168/EC: Council Decision of 25 Jan. 1999 Adopting a Specific Programme for Research, Technological Dev. and Demonstration on a User-Friendly Info. Soc'y (1998 to 2002) Continued from 399D0168 (1999/168/EC), 1999 O.J. (L 64) at 20, §1.1 (regarding high cost of Internet rates as obstacle for ecom).

⁴⁴ See Reuters, *Europe Looks for Ways to Follow U.S. Web Boom*, CNET News.com (last visited Jan. 20, 2000) <<http://news.cnet.com/news/0-1005-200-1520018.html?tag=st.ne.1002.>>.

⁴⁵ See John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 897 (Summer 1999).

⁴⁶ Robin Fields, *Tracking Ecom Across Borders*, L.A. Times, May 26, 1999, at C10, available at 1999 WL 2162182.

⁴⁷ See John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 907 (Summer 1999); see also *MN Supreme Court Affirms State's Jurisdiction Over Nevada Internet Site*, 15 No. 17 Andrews Computer & Online Indus. Litig. Rep. 12 (1998) (stating that the Minn. Supreme Court affirmed personal jurisdiction over Internet gambling operated in Nevada and elaborated on jurisdictional requirements to be tried in Minn.).

⁴⁸ See Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 365 (June 14-15, 1999).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 912

e-consumer and e-business interests. Converged, EU and US e-commerce policy interests would address e-consumers concerns⁵² and alleviate e-business's jurisdictional, legislative and regulatory concerns.⁵³ Yet, because many in the US disagree that the Internet should be regulated, this convergence has not taken place.

2. *Regulations and a New Medium = d-E-lemm@*

Some state that "cyber space" is a "separate jurisdiction" where new laws and regulations should be applied;⁵⁴ while others only consider it a new technological medium where old regulations apply.⁵⁵ Still many debate the effectiveness of e-commerce regulations, stating that domestic and foreign regulations may blunt e-commerce expansion⁵⁶ and create "turf wars" mainly between the EU and US.⁵⁷ When determining whether regulations should apply to the Internet or whether government should take a limited role,⁵⁸ one must address personal jurisdictional, territorial, extra-territorial and self-regulatory arguments. Once reviewed, one can understand why the EU and US must address e-commerce regulation and why "cyber utopians" fail when advocating a regulation-free Internet.⁵⁹

Some claim that government has no "legitimate" authority⁶⁰ in the Internet's "self-contained" jurisdiction.⁶¹ This argument posits that the Internet exists in no "distinct place,"⁶²

(Summer 1999).

⁵² See Lauren Coleman-Lochner, *Retail Scams Lurk Among Cybershopping Sites*, Austin Am.-Statesman, Jan. 19, 1999, at D2, available at 1999 WL 7400043, at * ¶¶ 20-1; John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 896-7, 942 (Summer 1999).

⁵³ See Katrina Nicholas, *Sellers May Be Strolling Into A Legal Maze*, Sydney Morning Herald, Sept. 2, 1999 (Pg. Unavail. Online) at 30, available at 1999 WL 24897266; Robin Fields, *Tracking Ecom Across Borders*, L.A. Times, May 26, 1999, at C10, available at 1999 WL 2162182; see also John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 896-7, 911-2, 942 (Summer 1999).

⁵⁴ See Dee Pridgen, *How Will Consumers Be Protected on the Info. Superhighway?*, 32 Land & Water L. Rev. 237 (1997).

⁵⁵ *Id.* at 247-8; see also Legal Advisory Board, *EIIA publishes a Legal Guide for Info. Service Providers and Users*, Mar. 24, 1995 (last visited Sept. 12, 1999) <<http://www.echo.lu/impact/eiia/legpress.html>> (discusses EU and member state laws passed regarding the Internet); Valerie Lawton, *Barbie Lawsuit Shows Ecom Pitfalls Consumer Groups Push For Shopper Protection on Net*, Toronto Star, Oct. 12, 1998, at C1, available at 1998 WL 30667931, at * ¶¶ 9-11.

⁵⁶ See John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 912, 941 (Summer 1999).

⁵⁷ See *id.* at 941, n.193.

⁵⁸ *Id.* at 953.

⁵⁹ John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 955-6 (Summer 1999).

⁶⁰ *Id.* at 953-4.

effects “everywhere, simultaneously and equally in all corners of the global network”⁶³ and enters jurisdictions only mechanically and situationally.⁶⁴ Yet, this argument does not address the present and effective government regulation of other commercial sectors that utilize analogous “simultaneous” mediums such as television, telephones and telemarketing.⁶⁵ E-consumers who live in the “real world” feel the effects of e-commerce activity, and these “effects”⁶⁶ indicate a state interest in protecting its citizenry.⁶⁷ Thus, government authority may address e-commerce issues, for it can be tied to a physicality⁶⁸-- harmed citizens or jurisdictional borders.

Some state that e-commerce regulations would be “futile”⁶⁹ for e-commerce “electrons” enter and exit sovereign territories without detection.⁷⁰ Yet, telephone transactions far exceed e-commerce activity,⁷¹ and yet telephony regulations are highly prevalent.⁷² Further, telephony regulations fostered consumer confidence and helped the industry to prosper. Already, China, Germany, Singapore and others use technology to filter Internet content.⁷³ While *per* e-commerce transaction monitoring is not necessary, is resource exhaustive and might violate privacy interests, heightened penalties may be applied effectively for e-consumer regulation violations.⁷⁴

⁶¹ *Id.*

⁶² *Id.* at 953, 968.

⁶³ See John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 953-4, n.250 (Summer 1999).

⁶⁴ See *id.* at 953-4, 957-8.

⁶⁵ *Id.*

⁶⁶ *Id.* at 957.

⁶⁷ See Shearer, I.A., *STARKE'S INT'L LAW* (London; Butterworth, 1994) p. 184; Darrel Menthe, et al., *Jurisdiction in Cyberspace: The Theory of Int'l Spaces, Legal Issues in Cyberspace*, 4 Mich. Tel. Tech.L.Rev. 3 (Apr. 23, 1998), available at (last visited Sept. 12, 1999) <http://www-leland.stanford.edu/class/law449/spring_97/papers/menthe.htm> or

<<http://www.law.umich.edu/mttlr/volfour/menthe.html>>.

⁶⁸ See John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 960 (Summer 1999).

⁶⁹ *Id.* at 954.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 960-1 (Summer 1999).

⁷³ See *id.*

⁷⁴ See *id.*

Further, it is true that Internet jurisdictional assertions are problematic. “This would mean ... that Singapore or Iraq ... [could] regulate the activities of U.S. companies operating in Cyberspace from a location physically within the United States.”⁷⁵ Yet, the inability of business to limit jurisdictional contacts does not lessen a jurisdiction’s policy interest to hold e-business activity accountable for e-commerce activity within its own borders. Also, contacts and effects-based personal jurisdiction models allow e-businesses to limit liability to favorable jurisdictions by self-imposed measures limiting consumer-initiated e-commerce transactions.⁷⁶

Lastly, e-businesses argue that self-regulation⁷⁷ is the only effective means to ensure e-commerce protection,⁷⁸ arguing that those who “establish and use online systems” are best able to protect e-consumers and enforce their own rules.⁷⁹ Yet, many doubt whether any e-business would limit self-interested actions or have the ability to regulate foreign or domestic deceptive trade practices.⁸⁰ Relying upon market forces, e-commerce fraud is highly resistant to self-regulation and allows perpetrators to harm e-consumers even with content-filter mechanisms and non-governmental informational campaigns.⁸¹ Voluntary self-regulation only would bind those who abide by such measures,⁸² for perpetrators have no interest in protecting e-consumer interests⁸³ – thus necessitating governmental intervention.⁸⁴

The dilemma between fostered market growth and government monitoring does not lessen the strong public policy interests involved.⁸⁵ Government has an interest in ensuring that e-consumer confidence reinforces e-commerce as a viable commercial medium, benefiting both

⁷⁵ See John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 955 (Summer 1999).

⁷⁶ See *id.*; see also A Eur. Initiative in Elec. Commerce Communication to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions COM(97)157 § III(39)(2) (Apr. 15, 1997) (last visited Sept. 12, 1999) <<http://www.cordis.lu/esprit/src/ecomcomx.htm>>.

⁷⁷ See Mark Owen, *Int’l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 274 (June 14-15, 1999).

⁷⁸ See John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 955 (Summer 1999).

⁷⁹ See *id.*

⁸⁰ See Janet Woodcock, Dr., *Online Pharmacies*, 1999 WL 20010890, at * ¶ 39 (July 30, 1999) (Pg. Unavail. Online); Carl T. Hall, *FTC Wants to Regulate Online Pharmacies*, S.F. Chron., July 31, 1999, at A2, available at 1999 WL 2692371; John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 962, 965 (Summer 1999).

⁸¹ See *id.* at 962-4.

⁸² *Id.* at 963-4.

⁸³ *Id.* at 963-4.

⁸⁴ See John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 962 (Summer 1999).

⁸⁵ See *id.* at 942-3, n.199, 962, 965.

e-businesses and e-consumers.⁸⁶ Without government action, e-consumers may adopt vigilantism to fight e-business abuses.⁸⁷ Yet, government e-commerce action must be calculated and targeted, balance market and social policies in the process,⁸⁸ take the Internet mechanism into consideration⁸⁹ and not eliminate e-commerce's attraction – efficiency, low cost, easily accessible consumer base and the simultaneous nature of business transactions.⁹⁰

III. E-Commerce Concerns and the Cultural Battle Waging Between the EU and US

The electronic marketplace is open for business, but with little in the way of protection for the people shopping there.⁹¹

With this growth, the Internet has become a place where e-consumers unsuspectingly fall prey to lurking dangers.⁹² With the Internet posing an unpredictable “legal environment,”⁹³ e-consumers may become more “cautious” about e-commerce purchases than confident.⁹⁴ With much at stake, it would seem that the EU and US would work to ensure that e-consumers have confidence that their “finances, data, information, privacy, expectations and lives”⁹⁵ are safe from this net-“exploitation.”⁹⁶ “Consumers have to feel as comfortable doing business in cyber-

⁸⁶ *Id.* at 965.

⁸⁷ *Id.*

⁸⁸ *See id.* at 943.

⁸⁹ *See* John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 *Ind. L.J.* 893, 941 (Summer 1999).

⁹⁰ *Id.* at 941-2; *see also* Roger Tasse, et al., CONSUMER PROTECTION RIGHTS IN CANADA IN THE CONTEXT OF ELEC. COMMERCE 46-50 (1998) (reviewing consumer protection legislation in Canada) *available at* <http://strategis.ic.gc.ca/pics/ca/full_e.pdf>.

⁹¹ Valerie Lawton, *Barbie Lawsuit Shows Ecom Pitfalls Consumer Groups Push For Shopper Protection on Net*, *Toronto Star*, Oct. 12, 1998, at C1, *available at* 1998 WL 30667931, at * ¶ 1.

⁹² *See* White House, *A Framework for Global Elec. Commerce*, at ¶ 7 (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/framework.htm>>; *see also* Eric Fisher, *U.S. Will Take Close Look at E-selling*, *Wash. Times*, Feb. 6, 1999, at C1, *available at* 1999 WL 3077376.

⁹³ White House, *A Framework for Global Elec. Commerce*, at ¶ 7 (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/framework.htm>>.

⁹⁴ *See Cyberspace: Who Will Make the Rules? Commerce's William Daley on Privacy and Taxes*, *Bus. Wk.*, Mar. 22, 1999, at 30D, *available at* 1999 WL 8226544 at * 4; *see also* White House, *A Framework for Global Elec. Commerce*, at ¶ 7 (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/framework.htm>>.

⁹⁵ *Internet Purchases are Safer Than Phone, at Least for Now*, *The Orange County Register*, Aug. 22, 1999, at K05, *available at* 1999 WL 4315903.

⁹⁶ *See* Eric Fisher, *U.S. Will Take Close Look at E-selling*, *Wash. Times*, Feb. 6, 1999, at C1, *available at* 1999 WL 3077376.

space as they do on Main Street[.]”⁹⁷ Yet, while the US has hosted “conferences and events involving governments, [the] private sector and international organisations [*Brit. spelling*],”⁹⁸ it has failed to actually address e-consumer protection, leaving others to fill the void.⁹⁹ While the US addresses only cybercrime and fraudulent, deceptive and unfair e-business business practices [“US e-commerce policy”¹⁰⁰], the EU has acted to protect e-consumers from *caveat emptor* business practices [“EU e-commerce policy”¹⁰¹]. Even as both stride for joint Internet and e-commerce policy,¹⁰² this policy disparity causes resulting conflicts and cultural skirmishes.¹⁰³ While the EU demands a more “global”¹⁰⁴ Internet regime¹⁰⁵ free from American monopolization,¹⁰⁶ it has refused to water-down highly protective EU consumer legislation¹⁰⁷ even with the

⁹⁷ See *Commerce Dep't to Publish Internet Sales Figures*, L.A. Times, Feb. 6, 1999, at C2, available at 1999 WL 2127347 (quoting Sec. William Daley of Dep't of Commerce regarding on-line sales).

⁹⁸ Directorate-General XIII, Telecommunications, Info. Mkt. and Exploitation of Research, Communication from the Comm'n to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions, The Need for Strengthened Int'l Coordination (COM (98) 50, at § 3.1(1) (last visited Sept. 12, 1999) <<http://www.ispo.cec.be/eif/policy/com9850en.html>>.

⁹⁹ Holly K. Towle, *On-Line: Selected Issues in Contracts*, 557 PLI/Pat 715, 728 (Apr. 29-30, 1999); see Holly K. Towle, *UCITA Elec. Contracting Principles and Regulatory Overlays*, 563 PLI/Pat 427, 439 (1999).

¹⁰⁰ Hereinafter, this paper designates policies that regulate fraudulent Internet business practices as “US policy.” See also Opinion of the Economic and Social Comm. on the 'Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions: A Eur. Initiative in Elec. Commerce, 1998 O.J. (C 019) at 72, §1.7.2.

¹⁰¹ Hereinafter, this paper designates policies that regulate non-criminal business practices and the business/consumer relationship as “EU e-commerce policy.”

¹⁰² See Katrina Nicholas, *Sellers May Be Strolling Into A Legal Maze*, Sydney Morning Herald, Sept. 2, 1999 (Pg. Unavail. Online) at 30, available at 1999 WL 24897266.

¹⁰³ See Robert MacMillan, *US Will Follow Web Sales And Pursue Self-Regulation*, Newsbytes, Feb. 5, 1999 (Pg. Unavail. Online), available at 1999 WL 5118700 at * 11-3.

¹⁰⁴ Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 266 (June 14-15, 1999); see Opinion of the Economic and Social Comm. on the 'Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions: A Eur. Initiative in Elec. Commerce, 1998 O.J. (C 019) at 72, § II(1.2).

¹⁰⁵ See *Elec. Commerce: Comm'n Presents Framework for Future Action*, RAPID, Apr. 16, 1997, at Press Release: IP: 97/313, at ¶¶ 1, 7(2); see also Resolution on the Communication From the Comm'n on Globalisation and the Info. Soc'y: The Need for Strengthened Int'l Coordination (COM(98)0050 C4- 0153/98), 1999 O.J. (C 104) at 128, §§ 4, 4(a), 4(b), 4(f) (making recommendations to the commission regarding information society globalization taking the form of an Int'l Internet Charter, noting that consumer protection should be ensured, and stating that any international agreement should not “subvert” Eur. public interest principles – consumer protection laws).

¹⁰⁶ See Eur. Comm'n proposes a Draft Reply of the EU and its Member States to the US Green Paper on Internet Governance, ¶¶ 2, 3 (last visited Sept. 12, 1999) <<http://www.ispo.cec.be/eif/dns/ip98184.html>>; Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 266 (June 14-15, 1999); see also Opinion of the Economic and Social Comm. on

difficulties associated with these enactments.¹⁰⁸ The US counters by charging EU actions as protectionist¹⁰⁹ and anti-American-ist.¹¹⁰ More tempers are raised than solutions.

This disagreement became blows during the 1998 OECD Ottawa conference¹¹¹ regarding Internet governance.¹¹² The US and its business interests effectively gutted e-consumer protection from the resulting agreement.¹¹³ “The business community complained there's too much onus on sellers to figure out consumer protection laws of umpteen countries.”¹¹⁴ The US stated that it wanted the OECD to place more emphasis on self-regulation and to allow business to “continue to establish fair, effective and transparent internal mechanism[s]”¹¹⁵ rather than seek-

the 'Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions: A Eur. Initiative in Elec. Commerce, 1998 O.J. (C 019) at 72, § 11(1.2); *Info. Soc'y: EU and Member States Insist on Int'l Nature of Internet*, Eur. Report, Mar. 21, 1998, at ¶ 1 (stating the EU is unwilling to accept Am. reorganization and management of Internet and that any proposals should be subject to bilateral and multilateral examination).

¹⁰⁷ See John Goldring, *Consumer Protection, Globalization and Democracy*, 6 Cardozo J. Int'l & Comp. L. 1, 9 (Spring 1998); *Internet: Eur. Parl. Endorses Continued U.S.-EU Efforts to Develop 'Internet Charter'*, BNA Patent, Trademark & Copyright Law Daily News, Jan. 20, 1999; see also Written Question No. 2024/97 by Marjo Matikainen-Kallstrom to the Comm'n re: Use of the Internet to Disseminate Illegal and Damaging Info., 1998 O.J. (C 60) at 80, ¶ 1.

¹⁰⁸ See Marcia Macleod, *Eur. Ecom Stands Divided, Giga's Business Online Conference Finds Eur. Struggling to Keep up With the Am.s.*, Network News (Eur.), Apr. 28, 1999, at ¶¶ 3, 14(1)-(2); Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 278 (June 14-15, 1999).

¹⁰⁹ Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 290 (June 14-15, 1999).

¹¹⁰ See Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 323 (1999); Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 266-7, 288 (June 14-15, 1999).

¹¹¹ See OECD, *Elec. Commerce*, No. 1-1997 (last visited Sept. 12, 1999) <http://www.oecd.org/publications/Pol_brief/9701_Pol.htm>; see also *Consumer Groups Take OECD to Task on Net Protection*, The Edmonton Sun, Oct. 8, 1998 (Pg. Unavail. Online), available at 1998 WL 19790597 (noting that OECD members agreed to develop consumer protections by 1999).

¹¹² See David Cowell, *Ecom Guidelines Sought to Shield Shoppers*, Globe & Mail (Toronto Can.), Sept. 6, at B5; see also *EU Law Seen as Grave Threat to Ecom* (last visited Sept. 12, 1999) <<http://legalnews.findlaw.com/news/19990910/bctechuinternet.html>> (noting that EU law would inhibit ecom growth and other international conflicts); Sylvia Pennington, *Eur. Handcuffs Ecommerce With Consumer Rights Laws*, Newswire, Sept. 9, 1999 (Pg. Unavail. Online), available at 1999 WL 6823762 (stating that EU member states need to harmonize present consumer protection laws if consumer protection is to be achieved); *Consumer Groups Take OECD to Task on Net Protection*, The Edmonton Sun, Oct. 8, 1998 (Pg. Unavail. Online), available at 1998 WL 19790597.

¹¹³ See *OECD Looks to Consumer Internet Regulations*, Comm. Daily, Sept. 9, 1999 (Pg. Unavail. Online), available at 1999 WL 7580326.

¹¹⁴ See *Consumer Groups Take OECD to Task on Net Protection*, The Edmonton Sun, Oct. 8, 1998 (Pg. Unavail. Online), available at 1998 WL 19790597.

¹¹⁵ *OECD Looks to Consumer Internet Regulations*, Comm. Daily, Sept. 9, 1999 (Pg. Unavail. Online), available at

ing an international e-consumer protection standard.¹¹⁶ In contrast, the EU wanted formalistic codes and regulations adopted to ensure specific e-consumer protections,¹¹⁷ mirror images of its own highly protective consumer protections,¹¹⁸ were guaranteed.¹¹⁹ This polarization left the resulting agreement without any real e-consumer protections¹²⁰ or e-commerce substance.

Certainly, a middle ground can be found that incorporates EU and US perceptions of e-consumer protection.¹²¹ This will most likely be based on the mechanism that the EU and US develop to facilitate such policies. Until then, the a lack of e-consumer protections, causing lost confidence, could be more damaging than any complex regulatory system. Given e-commerce's global nature, EU and US policies must be addressed and converged to facilitate regulation that is acceptable to most parties even though every e-commerce interest might not be thoroughly addressed.

1. **EU E-Commerce Policy**

a) *EU Consumer and e-Consumer Protection Policy*

[The] consumer [is] an asset.¹²²

[The] single market 'will not function properly without the active and genuine participation of consumers.'¹²³

Contrasting US e-commerce policy,¹²⁴ EU consumer¹²⁵ and e-consumer¹²⁶ policy protects e-consumers¹²⁷ from overzealous e-businesses¹²⁸ that cut "a few legal [contractual] corners" to

1999 WL 7580326.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Opinion of the Economic and Social Comm. on the ' Single Mkt. and Consumer Protection: Opportunities and Obstacles, 1995 O.J. (C 039) at 55, §§ 2.1.1.1(5), 6.1.2.2(2).

¹¹⁹ See Council Resolution of 19 Jan. 1999 on the Consumer Dimension of the Info. Soc'y, (1999/C 23/01) 1999 O.J. (C 023) at 1, at Preamble 13.

¹²⁰ See Valerie Lawton, *Barbie Lawsuit Shows Ecom Pitfalls Consumer Groups Push For Shopper Protection on Net*, Toronto Star, Oct. 12, 1998, at C1, available at 1998 WL 30667931, at * ¶¶ 13-7; Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 324 (1999).

¹²¹ See Lauren Coleman-Lochner, *Retail Scams Lurk Among Cybershopping Sites*, Austin Am.-Statesman, Jan. 19, 1999, at D2, available at 1999 WL 7400043, at * ¶¶ 18-9.

¹²² See Opinion of the Comm. of the Regions on the 'Communication from the Comm'n on priorities for consumer policy 1996-1998, 1996 (C 337) at 49 [CdR 221/96 fin], § 4.2.

¹²³ Opinion of the Economic and Social Comm. on the ' Single Mkt. and Consumer Protection: Opportunities and Obstacles, 1995 O.J. (C 039) at 55, § 2.2.1.2(3).

¹²⁴ See John Goldring, *Consumer Protection, Globalization and Democracy*, 6 Cardozo J. Int'l & Comp. L. 1, 4 (Spring 1998); see also Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887, 891-2

(Summer 1998) (noting that the US has various consumer protection laws like the Fed. Food, Drug and Cosmetics Act which has been a positive influence on business and consumer alike).

¹²⁵ For EU consumer policy development, please See Opinion of the Economic and Social Comm. on the 'Single Mkt. and Consumer Protection: Opportunities and Obstacles, 1995 O.J. (C 039) at 55; see Opinion of the Comm. of the Regions on the 'Communication from the Comm'n on priorities for consumer policy 1996-1998, 1996 (C 337) at 49 [CdR 221/96 fin], §§ 1.1.2, 1.1.4, 1.2.5, 1.2.6, 2.3, 2.4, 3.2.3, 3.8.1; Resolution on the Communication from the Comm'n on Priorities for Consumer Policy (1996-1998) (COM(95)0519 C4-0501/95), 1997 O.J. (C 085) at 133(1); Council Resolution of 28 June 1999 on Community Consumer Policy 1999 to 2001, 1999 O.J. (C 206) at 1, at Preamble 6, §§ II(5), II(6); Alastair Tempest, Director General and Asuncion Caparros, Director Eur. Affairs, FEDMA, *Country of Origin and Ecom - Defending Eur. Consumer and Business Interests*, at ¶ 7 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>>; Frances E. Zollers, et al., *Consumer Protection in the Eur. Union: an Analysis of the Directive on the Sale of Consumer Goods and Assoc.d Guarantees*, 20 U. Pa. J. Int'l Econ. L. 97, 98-103 (Spring 1999); see also Council Resolution of 19 Jan. 1999 on the Consumer Dimension of the Info. Soc'y, 1999 O.J. (C 023) at 1 (1999/C 23/01), Preamble 12 (noting the importance of consumer and business interests in a coordinated consumer policy action); Ben Goodger, *Cyberspace - Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 323 (1999) (discussing the Rome Convention and choice of law clauses, specifically concentrating on English law).

¹²⁶ See A Eur. Initiative in Elec. Commerce Communication to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions COM(97)157, §§ I(2), IV(1) (Apr. 15, 1997) (last visited Sept. 12, 1999) <<http://www.cordis.lu/esprit/src/ecomcomx.htm>>; Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427] at § 2.1.2, Art. 16; Opinion of the Economic and Social Comm. on the 'Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions: A Eur. Initiative in Elec. Commerce, 1998 O.J. (C 019) at 19, 72 and § II(1.2), §1.4, §2.6; Council Resolution of 19 Jan. 1999 on the Consumer Dimension of the Info. Soc'y, 1999 O.J. (C 023) at 1, at Preambles 6, 7, §§ I(3), II(2)(1)-(2) (1999/C 23/01); Resolution on the Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions on a Eur. Initiative in Elec. Commerce (COM(97)0157 - C4-0297/97), 1998 O.J. (C 167) at 203; *The Fed. Republic of Germany and the Eur. Comm'n Have Jointly Organised the Eur. Ministerial Conference Entitled "Global Info. Networks: Realising the Potential," held in Bonn from 6-8 July 1997* (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/final.html>>, at ¶¶ 7, 11, 19, 21, 23, 29; John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 920 (Summer 1999); Jan Howells, *Eur. Ecommerce Regulation Expected Today*, Newswire, Nov. 18, 1998 (Pg. Unavail. Online), available in 1998 WL 23801890; Sylvia Pennington, *Eur. Handcuffs Ecommerce With Consumer Rights Laws*, Newswire, Sept. 9, 1999 (Pg. Unavail. Online), available at 1999 WL 6823762; Mike Pullen, *The draft Ecom Directive - Good News for SMEs and Consumer Choice*, at ¶ 12 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>>; *EU Law Seen as Grave Threat to Ecom* (last visited Sept. 12, 1999) <<http://legalnews.findlaw.com/news/19990910/bctechuinternet.html>>; Reuters, *EU Passes Ecom Rules*, CNET News.com, (last visited Jan. 20, 2000) <<http://news.cnet.com/news/0-1007-200-342194.html?tag=st.cn.1.>>; Reuters, *EU Ministers to Rule on Ecom Measures*, CNET News.com (last visited Jan. 20, 2000) <<http://news.cnet.com/news/0-1007-200-341364.html?tag=st.cn.1.>>; Reuters, *EU Bill Holds Future of Ecom*, Nov. 24, 1999 (last visited Jan. 20, 2000) <<http://news.cnet.com/news/0-1007-200-1463426.html?tag=st.cn.1.>>; Bob Tedeschi, *European Union Advances Ecom Policies*, Apr. 26, 1999 (last visited Jan. 20, 2000) <<http://www.nytimes.com/library/tech/99/04/cyber/commerce/26commerce.html>>; *Elec. Commerce - A New Battleground for Consumer*, 2 Consumer Voice (1999) at ¶¶ 1, 7, 7(1), 7(2), 8 (stating that the ecom issue is whether traditional policies and rules are adaptable for the Internet), 10 (last visited Sept. 12,

gain advantages against competitors,¹²⁹ resulting in unintentional e-consumer harm. EU policy takes a somewhat flexible¹³⁰ globalized¹³¹ approach utilizing directives and regulations¹³² to build

1999) <http://europa.eu.int/comm/dg24/library/pub/cv/cv992/cv992-07_en.html>; *EU Maps Out Ecom Rules*, Chemist & Druggist, Jan. 18, 2000 (last visited Jan. 20, 2000) <http://zdecom.newsreal.com/osform/NewsService?osform_template=pages/zdecomStory&ID=zdecom&path=News/Story_2000_01_18.NRdb@2@16@3@1716>; Bloomberg News, *EU Rules May Dampen E-Commerc Growth in Europe*, CNET News.com, (last visited Jan. 20, 2000) <<http://news.cnet.com/news/0-1007-200-344679.html?tag=st.ne.1002>>; Bloomberg News, *EU Commissioner Pushing for Net Self-Regulation*, CNET News.com, (last visited Jan. 20, 2000) <<http://news.cnet.com/news/0-1005-200-1474413.html?tag=st.ne.1002>>; Reuters, *EU Bill Holds Future of Ecom*, CNET News.com, (last visited Jan. 20, 2000) <<http://news.cnet.com/news/0-1007-200-1463426.html?tag=st.ne.1002>>; see also Protecting Consumers' Economic and Legal Interests, COM(97) 157, at ¶ 8 [not pub. in Official Journal] (noting the relationship between a favorable business relationship and consumer confidence); Resolution on the Communication From the Comm'n on Globalisation and the Info. Soc'y: The Need for Strengthened Int'l Coordination (COM(98)0050 C4- 0153/98), 1999 O.J. (C 104) at 128, §§ 4, 4(a), 4(b), 4(f) (making recommendations to the commission regarding information society globalization taking the form of an Int'l Internet Charter, noting that consumer protection should be ensured, and stating that any international agreement should not "subvert" Eur. public interest principles – consumer protection laws); Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 289 (June 14-15, 1999) (noting that the French language and other language requirements are pseudo-consumer protection devices that the member states may use to ensure that customers can read product advertising); and Alastair Tempest, Director General and Asuncion Caparros, Director Eur. Affairs, FEDMA, *Country of Origin and Ecom - Defending Eur. Consumer and Business Interests*, ¶ 5 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>> (noting that the Brussels Convention stipulates where parties may sue in EU cross-border consumer disputes).

¹²⁷ Council Resolution of 28 June 1999 on Community Consumer Policy 1999 to 2001, 1999 O.J. (C 206) at 1, § II(4).

¹²⁸ See *id.* at ¶ 31.

¹²⁹ C.f. Steve Johnson, *Promotion by Cal. Ecom Co. Onsale under Investigation*, Knight-Ridder Trib. Bus. News, Apr. 28, 1999 (Pg. Unavail. Online) at ¶ 10, available at 1999 WL 17333724.

¹³⁰ Directorate-General XIII, Telecommunications, Info. Mkt. and Exploitation of Research, Communication from the Comm'n to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions, The Need for Strengthened Int'l Coordination (COM (98) 50 (last visited Sept. 12, 1999) <<http://www.ispo.cec.be/eif/policy/com9850en.html>> at § 1(1); see Resolution on the Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions on a Eur. Initiative in Elec. Commerce (COM(97)0157 - C4-0297/97), 1998 O.J. (C 167) at 203, Preamble R.

¹³¹ Opinion of the Economic and Social Comm. on the 'Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions: A Eur. Initiative in Elec. Commerce, 1998 O.J. (C 019) at 72; see Directorate-General XIII, Telecommunications, Info. Mkt. and Exploitation of Research, Communication from the Comm'n to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions, The Need for Strengthened Int'l Coordination (COM (98) 50 (last visited Sept. 12, 1999) <<http://www.ispo.cec.be/eif/policy/com9850en.html>> at § 1(3).

¹³² *Info. Soc'y: Comm'n Launches Debate on Virtual World*, Eur. Report, Feb. 4, 1998, at No. 2288, at ¶ 3.

consumer trust¹³³ and to accelerate EU economic and social integration.¹³⁴ “Sometimes companies grow very quickly, and they have not done everything they need to do on the customer service side[.]”¹³⁵ With unequal market¹³⁶ “access to information and economic power,”¹³⁷ e-consumers have a diminished bargaining position when compared with e-businesses.¹³⁸ “[I]nterest groups which favor state intervention and which are numerically large but lack resources, like consumer interests and environmentalists, have greater success at local levels than interest groups with fewer numbers and more resources, like organized business groups.”¹³⁹ By opposing true contractual¹⁴⁰ freedom,¹⁴¹ EU consumer policy uses public¹⁴² and private law ele-

¹³³ Opinion of the Economic and Social Comm. on the 'Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions: A Eur. Initiative in Elec. Commerce, 1998 O.J. (C 019) at 72; see Council Resolution of 19 Jan. 1999 on the Consumer Dimension of the Info. Soc'y, 1999 O.J. (C 023) at 1, at Preambles 6(g) and 7 (1999/C 23/01).

¹³⁴ Directorate-General XIII, Telecommunications, Info. Mkt. and Exploitation of Research, Communication from the Comm'n to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions, The Need for Strengthened Int'l Coordination (COM (98) 50 (last visited Sept. 12, 1999), § 2.1(8); see David Cowell, *Ecom Guidelines Sought to Shield Shoppers*, Globe & Mail (Toronto Can.), Sept. 6, at B5; *EU Law Seen as Grave Threat to Ecom* (last visited Sept. 12, 1999) <<http://legalnews.findlaw.com/news/19990910/bctechuinternet.html>>.

¹³⁵ Bobby McGill, *Fraud Watchers Patrol Internet Resources Help Consumers Avoid Online Problems*, Ariz. Republic, Aug. 8, 1999, at D4, available at 1999 WL 4191106.

¹³⁶ John Goldring, *Consumer Protection, Globalization and Democracy*, 6 Cardozo J. Int'l & Comp. L. 1, 2 (Spring 1998); see David Cowell, *Ecom Guidelines Sought to Shield Shoppers*, Globe & Mail (Toronto Can.), Sept. 6, at B5; *Financial Services: A Search for Common Ground With Consumers*, Eur. Report, Nov. 6, 1996, at No. 2172, at ¶ 10; see also Opinion of the Economic and Social Comm. on the 'Single Mkt. and Consumer Protection: Opportunities and Obstacles, 1995 O.J. (C 039) at 55, § 6.1.1.2(1)-(2) (noting that consumers benefit from the wider choice available in the common market).

¹³⁷ John Goldring, *Consumer Protection, Globalization and Democracy* 6 Cardozo J. Int'l & Comp. L. 1, 2 (Spring 1998); see Opinion of the Economic and Social Comm. on the 'Green Paper - Financial Services: Meeting Consumers' Expectations, 1997 O.J. (C 56) at 76, §§ 3.3.1, 3.3.3, 3.3.4 and 3.4.

¹³⁸ John Goldring, *Consumer Protection, Globalization and Democracy*, 6 Cardozo J. Int'l & Comp. L. 1, 2 (Spring 1998); see Comm'n Recommendation of 7 Apr. 1992 on Codes of Practice for the Protection of Consumers in Respect of Contracts Negotiated at a Distance (Distance Selling), 92/295/EEC, 1992 O.J. (L 156) at 21, § 1.2.2(1)-(5); see also Linda Lennard, Chairman of Eur. Info. Soc'y Working Group on Universal Service and Consumer Protection, Senior Policy and Dev. Officer at the Nat'l Consumer Council of the UK (Legal Advisory Board), *Empowering the User: Consumer Protection*, at ¶ 5 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/lennard.html>>.

¹³⁹ John Goldring, *Consumer Protection, Globalization and Democracy*, 6 Cardozo J. Int'l & Comp. L. 1, 3-4 (Spring 1998).

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 2-3.

¹⁴² See *id.* at 4.

ments¹⁴³ as “countervailing force[s]”¹⁴⁴ against consumer exploitation and adopts “criminal” or civil liability¹⁴⁵ as its enforcement mechanism. This “specific action”¹⁴⁶ hyper-balances e-consumer and e-business negotiation positions¹⁴⁷ to effect equally favorable e-business and e-consumer environments.¹⁴⁸

[Any successful policy includes] functional interplay between actors at Union, national, regional and local level, involving authorities, organizations and business.¹⁴⁹

Within ... a nation, democratic government allows consumer interests to use the countervailing power of the state to rectify, in part, the inherent imbalance of power in the market.¹⁵⁰

US e-consumer policy favors business efficiency, flexibility and practicalities¹⁵¹ and requires e-consumers to flush out unnoticed or hidden contractual terms¹⁵² and to negotiate a

¹⁴³ John Goldring, *Consumer Protection, Globalization and Democracy*, 6 *Cardozo J. Int'l & Comp. L.* 1, 4 (Spring 1998).

¹⁴⁴ *Id.* at 2.

¹⁴⁵ *Id.* at 4-5.

¹⁴⁶ Frances E. Zollers, et al., *Consumer Protection in the Eur. Union: an Analysis of the Directive on the Sale of Consumer Goods and Assoc.d Guarantees*, 20 *U. Pa. J. Int'l Econ. L.* 97, 102 (Spring 1999); see John Goldring, *Consumer Protection, Globalization and Democracy*, 6 *Cardozo J. Int'l & Comp. L.* 1, 2 (Spring 1998).

¹⁴⁷ See A Eur. Initiative in Elec. Commerce Communication to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions COM(97)157, §§ III(39)(6), IV(1) (Apr. 15, 1997) (last visited Sept. 12, 1999) <<http://www.cordis.lu/esprit/src/ecomcomx.htm>>; Opinion of the Economic and Social Comm. on the 'Single Mkt. and Consumer Protection: Opportunities and Obstacles, 1995 O.J. (C 039) at 55, §§ 2.1.1.2(1), 4.5; Council Resolution of 28 June 1999 on Community Consumer Policy 1999 to 2001, 1999 O.J. (C 206) at 1, §§ II(4), II (8); John Goldring, *Consumer Protection, Globalization and Democracy*, 6 *Cardozo J. Int'l & Comp. L.* 1, 2, 4 (Spring 1998); see also Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 *S.C. L. Rev.* 887, 891-2 (Summer 1998) (noting that the US has various consumer protection laws like the Fed. Food, Drug and Cosmetics Act which has been a positive influence on business and consumer alike).

¹⁴⁸ See Resolution on the Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions on a Eur. Initiative in Elec. Commerce (COM(97)0157 - C4-0297/97), 1998 O.J. (C 167) at 203, ¶ 13; Council Resolution of 19 Jan. 1999 on the Consumer Dimension of the Info. Soc'y, 1999 O.J. (C 023) at 1, Preamble 6(h) (1999/C 23/01); see also Opinion of the Economic and Social Comm. on the 'Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions: A Eur. Initiative in Elec. Commerce, 1998 O.J. (C 019) at 72, ¶¶ 11(1.2), 20.5, 21.2 (noting that business needs have to be taken into consideration when addressing consumer policy), 21.6 (noting that universal codes of conduct must be established to settle disputes and provide consumer protection).

¹⁴⁹ Opinion of the Comm. of the Regions on the 'Communication from the Comm'n on priorities for consumer policy 1996-1998, 1996 (C 337) at 49 [CdR 221/96 fin], § 4.3; see also Council Resolution of 28 June 1999 on Community Consumer Policy 1999 to 2001, 1999 O.J. (C 206) at 1, § II(8).

¹⁵⁰ *Id.*

¹⁵¹ See Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 *S.C. L. Rev.* 887, 893-5 (Summer

better bargain.¹⁵³ “While courts have the power to strike egregious provisions that violate public policy or are unconscionable, courts [] generally enforce form contracts against consumers.”¹⁵⁴ In contrast, EU consumer policy requires e-businesses to provide the e-consumers with enough information to fully appreciate the transaction.¹⁵⁵ EU regulations and directives address “the terms and conditions of contracts or to conduct intended to encourage the making of such contracts (e.g., marketing, packaging, advertising and provision of information)”¹⁵⁶ to remedy e-business mistakes and lapses regarding consumer expectations.¹⁵⁷

EU measures address the consumer’s need for easily accessible legal remedies¹⁵⁸ by adopting a “high level”¹⁵⁹ of consumer protection and by applying harmonizing¹⁶⁰ pro-consumer

1998).

¹⁵² See *id.* at 895.

¹⁵³ See *id.*

¹⁵⁴ *Id.* at 895-6.

¹⁵⁵ See John Goldring, *Consumer Protection, Globalization and Democracy*, 6 *Cardozo J. Int'l & Comp. L.* 1, 3 (Spring 1998); Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 *S.C. L. Rev.* 887, 890-1 (Summer 1998); *But See id.* at 895.

¹⁵⁶ John Goldring, *Consumer Protection, Globalization and Democracy*, 6 *Cardozo J. Int'l & Comp. L.* 1, 2 (Spring 1998).

¹⁵⁷ *Id.* at 3-4.

¹⁵⁸ Council Resolution of 28 June 1999 on Community Consumer Policy 1999 to 2001, 1999 O.J. (C 206) at 1, § II(4).

¹⁵⁹ *Id.* at Preamble 3; see Opinion of the Economic and Social Comm. on the 'Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions: A Eur. Initiative in Elec. Commerce, 1998 O.J. (C 019) at 72, ¶ 21.4(1); *The Fed. Republic of Germany and the Eur. Comm'n Have Jointly Organised the Eur. Ministerial Conference Entitled "Global Info. Networks: Realising the Potential," held in Bonn from 6-8 July 1997, at ¶ 22* (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/final.html>>.

¹⁶⁰ Harmonization is a process where EU directives or regulations require Member States to adapt their legislation in accordance with EU policies. Anything other than this “transposition” might violate the EU Treaty. See Opinion of the Comm. of the Regions on the 'Communication from the Comm'n on priorities for consumer policy 1996-1998, 1996 (C 337) at 49 [CdR 221/96 fin], § 1.2.6; Opinion of the Economic and Social Comm. on the 'Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions: A Eur. Initiative in Elec. Commerce, 1998 O.J. (C 019) at 72, ¶ 15.2.

minimal directives,¹⁶¹ incorporated “horizontally”¹⁶² within EU policy,¹⁶³ upon member states,¹⁶⁴ requiring substantive¹⁶⁵ localized protection.¹⁶⁶ Types of requirements include consumer organization representation within the legislative process,¹⁶⁷ informational campaigns¹⁶⁸ and government monitoring as a quality control device.¹⁶⁹ The EU requires businesses to provide a high level of product and service information,¹⁷⁰ by basing many decisions upon what the consumer expected and received, and addresses “fine print”¹⁷¹ or “surprise [contract] terms,”¹⁷² by requir-

¹⁶¹ See Opinion of the Comm. of the Regions on the 'Communication from the Comm'n on priorities for consumer policy 1996-1998, 1996 (C 337) at 49 [CdR 221/96 fin], §§ 1.2.5, 3.2.3; Opinion of the Economic and Social Comm. on the ' Single Mkt. and Consumer Protection: Opportunities and Obstacles, 1995 O.J. (C 039) at 55, § 2.2.2.2.

¹⁶² Council Resolution of 28 June 1999 on Community Consumer Policy 1999 to 2001, 1999 O.J. (C 206) at §II(10).

¹⁶³ *Id.* at Preamble 2.

¹⁶⁴ See Jan Howells, *Eur. Ecommerce Regulation Expected Today*, Newswire, Oct. 18, 1998 (Pg. Unavail. Online), available at 1998 WL 23801890.

¹⁶⁵ See Resolution on the Communication from the Comm'n on Priorities for Consumer Policy (1996-1998) (COM(95)0519 C4- 0501/95), 1997 O.J. (C 085) at 133(1), ¶ 1, § A(5).

¹⁶⁶ See Opinion of the Comm. of the Regions on the 'Communication from the Comm'n on priorities for consumer policy 1996-1998, 1996 (C 337) at 49 [CdR 221/96 fin], § 1.2.6.

¹⁶⁷ Opinion of the Economic and Social Comm. on the ' Single Mkt. and Consumer Protection: Opportunities and Obstacles, 1995 O.J. (C 039) at 55, §§ 3.1.2.2.1(1), 3.1.1.1(2); see Linda Lennard, Chairman of Eur. Info. Soc'y Working Group on Universal Service and Consumer Protection, Senior Policy and Dev. Officer at the Nat'l Consumer Council of the UK (Legal Advisory Board), *Empowering the User: Consumer Protection*, at ¶ 1 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/lennard.html>>; see also Opinion of the Comm. of the Regions on the 'Communication from the Comm'n on priorities for consumer policy 1996-1998, 1996 (C 337) at 49 [CdR 221/96 fin], § 2.9; *id.* at § 3.8.2 (noting COR's endorsement of community efforts to enhance status of consumer organizations as representatives of consumer interests within the EU framework).

¹⁶⁸ See *id.* at §§ 4.1, 3.1.1; Council Resolution of 19 Jan. 1999 on the Consumer Dimension of the Info. Soc'y, 1999 O.J. (C 023) at 1, Preamble 6(f) (1999/C 23/01).

¹⁶⁹ Opinion of the Comm. of the Regions on the 'Communication from the Comm'n on priorities for consumer policy 1996-1998, 1996 (C 337) at 49 [CdR 221/96 fin], § 3.5.4.

¹⁷⁰ Council Resolution of 28 June 1999 on Community Consumer Policy 1999 to 2001, 1999 O.J. (C 206) at 1, Preamble 1; see Eur. Comm'n, *Consumer Policy – Call for Expression of Interests* (JO/OJ S102 - 28/05/99) at 3(a)(1)(I)(1)-(2) (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>>; Opinion of the Economic and Social Comm. on the 'Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions: A Eur. Initiative in Elec. Commerce, 1998 O.J. (C 019) at 72, ¶ 25.3.

¹⁷¹ See Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887, 893-5 (Summer 1998).

¹⁷² *Id.* at 896.

ing contractual “transparency.”¹⁷³ EU consumer policy assumes that the consumer has difficulty understanding contract terms¹⁷⁴ and thus protects consumers from terms that even US lawyers recognize as a “waste[s] of time”¹⁷⁵ to read or tactically placed to conceal their legal effect.¹⁷⁶ Further, EU consumer policy assumes that while businesses may retain or use in-house attorneys,¹⁷⁷ institute debt collection procedures¹⁷⁸ or file bad credit reports,¹⁷⁹ a consumer may not. Working to increase e-consumer confidence¹⁸⁰ with these guarantees,¹⁸¹ EU consumer protection has become almost a fundamental right¹⁸² that has lessened, if not eliminated, *caveat emptor*.

¹⁷³ Linda Lennard, Chairman of Eur. Info. Soc’y Working Group on Universal Service and Consumer Protection, Senior Policy and Dev. Officer at the Nat’l Consumer Council of the UK (Legal Advisory Board), *Empowering the User: Consumer Protection*, at ¶ 17 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/lennard.html>>; Resolution on the Communication from the Comm’n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions on a Eur. Initiative in Elec. Commerce (COM(97)0157 - C4-0297/97), 1998 O.J. (C 167) at 203, ¶ 14; see Council Resolution of 19 Jan. 1999 on the Consumer Dimension of the Info. Soc’y, 1999 O.J. (C 023) at 1, Preamble 6(a) (1999/C 23/01); see also Holly K. Towle, *On-Line: Selected Issues in Contracts*, 557 PLI/Pat 715, 727 (Apr. 29-30, 1999) (noting the most recent EU directives regarding transparency mechanisms, distance contracts, etc.).

¹⁷⁴ See Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887, 897 (Summer 1998).

¹⁷⁵ *Id.*

¹⁷⁶ See *id.*

¹⁷⁷ *Id.* at 897-8

¹⁷⁸ See Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887, 897-8 (Summer 1998).

¹⁷⁹ *Id.*

¹⁸⁰ A Eur. Initiative in Elec. Commerce Communication to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions COM(97)157 (Apr. 15, 1997), §§ III(35) (last visited Sept. 12, 1999) <<http://www.cordis.lu/esprit/src/ecomcomx.htm>>, III(39)(5) (noting that any regulations should safeguard present levels of consumer protection), IV(62)(1) (noting that consumers have much to gain from ecom activity), IV(63)(1) (stating that consumers need to have a “hard trust” and “psychological trust” in ecom); see Opinion of the Economic and Social Comm. on the ‘Communication from the Comm’n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions: A Eur. Initiative in Elec. Commerce, 1998 O.J. (C 019) at 72, Ch. 3, ¶ 12; Elisabeth Logeais, *Roundup of Elec. Commerce in the Eur. Union*, 5 NO. 5 Multimedia Strategist 1, at ¶ 1 (1999).

¹⁸¹ Opinion of the Comm. of the Regions on the ‘Communication From the Comm’n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions on “A Eur. Initiative in Elec. Commerce,” O.J. (C 180) at 19, §3.3.1.

¹⁸² See Opinion of the Economic and Social Comm. on the ‘Single Mkt. and Consumer Protection: Opportunities and Obstacles, 1995 O.J. (C 039) at 55, §§ 2.2.2.2., 5.1(1); Council Resolution of 28 June 1999 on Community Consumer Policy 1999 to 2001, 1999 O.J. (C 206) at 1, § II(7).

In the face of this growing trade, legislators throughout Europe are facing exactly the same challenge as those in the US; how to encourage e-commerce while preserving consumer protections.¹⁸³

b) *EU E-Commerce Policy Requirements*

While US policymakers fear Internet regulation, EU policymakers refuse to allow this fear to hinder EU enactments¹⁸⁴ or malign EU consumer protections.¹⁸⁵ Rather, EU policymakers apply traditional EU consumer policies to e-commerce.¹⁸⁶ The result is that an enormous amount of EU policies,¹⁸⁷ including the Distance Contracts (Selling) Directive¹⁸⁸ and the pro-

¹⁸³ Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263 (June 14-15, 1999).

¹⁸⁴ Directorate-General XIII, Telecommunications, Info. Mkt. and Exploitation of Research, Communication from the Comm'n to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions, *The Need for Strengthened Int'l Coordination* (COM (98) 50, §§ 1(4), 1(5) (last visited Sept. 12, 1999) <<http://www.ispo.cec.be/eif/policy/com9850en.html>>; see Bloomberg News, *Finland Pushes for EU Ecom Law*, CNET News.com, (last visited Jan. 20, 2000) <<http://news.cnet.com/news/0-1007-200-850313.html?tag=st.ne.1002>>. But see Reuters, *Exec: European Policy Could Hurt Ecom*, CNET News.com, Nov. 3, 1999 (last visited Jan. 20, 2000) <<http://news.cnet.com/news/0-1007-200-1428707.html?tag=st.cn.1>>.

¹⁸⁵ *Internet Contracts Worth the Paper They're Written On?*, Sunday Bus. Post, Mar. 14, 1999 (Pg. Unavail. Online), available at 1999 WL 7280400; see Elisabeth Logeais, *Roundup of Elec. Commerce in the Eur. Union*, 5 NO. 5 Multimedia Strategist 1, at ¶ 1 (1999); Alastair Tempest, Director General and Asuncion Caparros, Director Eur. Affairs, FEDMA, *Country of Origin and Ecom - Defending Eur. Consumer and Business Interests*, at ¶ 20 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>>; Mike Pullen, *The draft Ecom Directive - Good News for SMEs and Consumer Choice*, at ¶ 13 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>>.

¹⁸⁶ Directorate-General XIII, Telecommunications, Info. Mkt. and Exploitation of Research, Communication from the Comm'n to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions, *The Need for Strengthened Int'l Coordination* (COM (98) 50, § 2.4(1) (last visited Sept. 12, 1999) <<http://www.ispo.cec.be/eif/policy/com9850en.html>>; see Council Resolution of 19 Jan. 1999 on the Consumer Dimension of the Info. Soc'y, 1999 O.J. (C 023) at 1, Preamble 8 (1999/C 23/01); Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 271 (June 14-15, 1999).

¹⁸⁷ Mike Pullen, *The draft Ecom Directive - Good News for SMEs and Consumer Choice*, at ¶ 9 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>>; see Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427] at Preamble 14; see also Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the EC Internal Market (1999/C 30/04) (Text with EEA relevance) COM(1998) 586 final - 98/0325(COD) (Submitted by the Comm'n on 23 Dec. 1998), 1999 O.J. (C 030), 4, at Preamble 10 (noting the various directives that will apply to the Internet).

¹⁸⁸ See *id.* at Preambles 9 and 10 (noting that the Distance Selling Directive will be a model of how ecom law will develop, with its right to withdrawal and other rights); see also Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/l32014.htm>>; Mark Owen, *Int'l Ramifications of Doing Business*

posed Distance Selling Financial Directive,¹⁸⁹ will apply to EU and US e-commerce activity¹⁹⁰ via the future E-Commerce Directive.¹⁹¹ Effectively, EU policy creates minimum¹⁹² requirements

Online: Europe, 564 PLI/Pat 263, 277 (June 14-15, 1999) (discussing transposition period for Distance Contracts Directive); Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 328, 331 (1999).

¹⁸⁹ Other Directives will apply to ecom activity: the Financial Services Directive, the Door-to-Door Sales Directive, the Customer Warranty Directive and the Directives on Advertising. While many directives apply to the Internet, the Distance Contracts (Selling) Directive and the Distance Financial Services Directive Proposal will most directly affect ecom. Thus, this paper will discuss the specifics of these two directives. See Directive 97/55/EC of Eur. Parl. and of the Council of 6 Oct. 1997 Amending Directive 84/450/EEC Concerning Misleading Advertising so as to Include Comparative Advertising, 1997 O.J. (L 290) at 18, at Art. 3(1) and Annex II; Proposal for a Directive of the Eur. Parl. and of the Council Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (98/C 385/10) (Text with EEA relevance) COM(1998) 468 final - 98/0245(COD); Amended Proposal for a Eur. Parl. and Council Directive Concerning the Distance Mktng of Consumer Financial Services and Amending Directives 97/7/EC and 98/27/EC, COM/99/0385, final at COD 99/0245 (Incorporating Amendment to the Proposal for the Distance Mktng of Consumer Financial Services Directive); Frances E. Zollers, et al., *Consumer Protection in the Eur. Union: an Analysis of the Directive on the Sale of Consumer Goods and Assoc.d Guarantees*, 20 U. Pa. J. Int'l Econ. L. 97 (Spring 1999); Holly K. Towle, *UCITA Elec. Contracting Principles and Regulatory Overlays*, 563 PLI/Pat 427, 440 (1999); see also Amended Proposal for a Eur. Parl. and Council Directive Concerning the Distance Mktng of Consumer Financial Services and Amending Directives 97/7/EC and 98/27/EC, COM/99/0385, at 1, final at COD 99/0245 (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty) (noting the Comm'n's adoption of the proposal for the Distance Mktng of Consumer Financial Services Directive); The EU Comm. of the Am. Chamber of Commerce in Belgium, *Business Guide to EU Initiatives 1998/1999*, at ¶ 6 (last visited Sept. 12, 1999) <<http://www.eu.int/>> (noting that even the financial services industry recognizes the need for special provisions for financial services).

¹⁹⁰ Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 266 (June 14-15, 1999); see Michael Chissick, *Will EU Directive Enhance Confidence in Internet Purchases?*, 4 No. 5 Multimedia Strategist 1, 6-8 (1998); Bloomberg News, *EU May Demand U.S. Privacy Compliance*, (last visited Jan. 20, 2000) <<http://news.cnet.com/news/0-1005-200-343065.html?tag=st.cn.1.>>; see also Legal Advisory Board, *EIIA publishes a Legal Guide for Info. Service Providers and Users*, Mar. 24, 1995 (last visited Sept. 12, 1999) <<http://www.echo.lu/impact/eiia/legpress.html>> (noting the difficulties in applying EU proposals and national laws when formulating business policy).

¹⁹¹ Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427, at ¶ 1, final at COD 98/0325 [continued from 599PC0427]; see Jan Howells, *Eur. Ecommerce Regulation Expected Today*, Newswire, Oct. 18, 1998 (Pg. Unavail. Online), available at 1998 WL 23801890; see also Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 265 (June 14-15, 1999) (noting the EU Elec. Commerce Directive); see also Holly K. Towle, *On-Line: Selected Issues in Contracts*, 557 PLI/Pat 715, 727 (Apr. 29-30, 1999) (noting the EU Elec. Commerce Directive); Elisabeth Logeais, *Roundup of Elec. Commerce in the Eur. Union*, 5 NO. 5 Multimedia Strategist 1, at ¶ 2 (1999) (noting the EU's recent developments related to ecom law).

¹⁹² Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427], Preamble 5; see Elisabeth Logeais,

that member states must meet when addressing e-commerce activity¹⁹³ such as removing legislation that might “curb” e-commerce¹⁹⁴ or adopting “proportional[]”¹⁹⁵ measures that coordinate¹⁹⁶

Roundup of Elec. Commerce in the Eur. Union, 5 NO. 5 Multimedia Strategist 1, at ¶ 6 (1999); see also Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, Arts. 1, 13 (the objective of the Directive) and § 2(3)(10) (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/l32014.htm>>; Mike Pullen, *The draft Ecom Directive - Good News for SMEs and Consumer Choice*, at ¶ 5 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>> (noting the minimal directives sometimes cause a proliferation of multiple standards of consumer protection);

¹⁹³ Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427, Preamble 6, final at COD 98/0325 [continued from 599PC0427].

¹⁹⁴ *Id.* at Preamble 2 and Arts. 9(2)-(3), 19; see also Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the EC Internal Market (1999/C 30/04) (Text with EEA relevance) COM(1998) 586 final - 98/0325(COD) (Submitted by the Comm'n on 23 Dec. 1998), 1999 O.J. (C 030), 4, at Annex I (noting activities excluded from the directive); Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 270-1 (June 14-15, 1999) (noting that the Ecom Directive does not apply to consumer contract obligations); Elisabeth Logeais, *Roundup of Elec. Commerce in the Eur. Union*, 5 NO. 5 Multimedia Strategist 1, at ¶ 2 (1999) (noting that member states shall ensure the validity of ecom contracts).

¹⁹⁵ Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427, Preamble 6, final at COD 98/0325 [continued from 599PC0427]; see *Elec. Commerce: Comm'n Proposes Legal Framework*, at ¶ 1 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>> (positing a summary of Ecom Directive fact).

¹⁹⁶ Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427], at Preamble 20(a), Art. 1(2); see Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the EC Internal Market (1999/C 30/04) (Text with EEA relevance) COM(1998) 586, final - 98/0325(COD) (Submitted by the Comm'n on 23 Dec. 1998), 1999 O.J. (C 030), 4, Ch. V, Art. 25, ¶ 2; Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, Art. 1; Proposal for a Directive of the Eur. Parl. and of the Council Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (98/C 385/10) (Text with EEA relevance) COM(1998) 468 final - 98/0245(COD), 1998 O.J. (C 385) at 10, Preambles 4, 5, 8; *The Nordic Consumer Ombudsmen's Position Paper to Trading and Mktng on the Internet and in Similar Communication Systems*, Forbrugerstyrelsen (last visited Sept. 12, 1999) <http://www.fs.dk/uk/acts/nord_gui.htm and <http://www2.echo.lu/legal>> at ¶¶ 1 (statement from Hagen Jørgensen, the Danish Consumer Ombudsman acknowledging that the EU requires a high level of Consumer protection), 2, 4(2), 4(5), 6, 15-22, 24, 27-8, 40-1, 43-5; Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 265-6 (June 14-15, 1999); see also Comm'n Recommendation of 7 Apr. 1992 on Codes of Practice for the Protection of Consumers in Respect of Contracts Negotiated at a Distance (Distance Selling), 92/295/EEC, 1992 O.J. (L 156) at 21, Art. 1(1) (noting that the financial services directive's objective is to approximate the laws of

member state e-commerce laws while ensuring a “high level” of e-consumer protection.¹⁹⁷ Even so, the EU encourages member states to legislate tougher e-consumer protections than minimally required.¹⁹⁸ Thus, while EU policy effectively becomes the minimum standard for e-consumer protection, EU member states may individually have more stringent laws that grant more rights to their e-consumers.

The E-Commerce Directive requires “effective[ly]” enforced e-consumer protections¹⁹⁹ for e-commerce transactions²⁰⁰ with “natural person[s]” – the e-consumer.²⁰¹ Limited to e-

member states for consumer financial services); *What's New?*, § 9.2(1)-(3) (last visited Sept. 12, 1999) <<http://www2.echo.lu/> and <http://www.etat.lu/ECO/>> (noting Luxembourg's draft electronic bill adapting civil, commercial and penal law to Internet activities).

¹⁹⁷ Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427] at Preamble 6 and Art 1(3); see Proposal for a Directive of the Eur. Parl. and of the Council Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (98/C 385/10) (Text with EEA relevance) COM(1998) 468 final - 98/0245(COD), 1998 O.J. (C 385) at 10, Preamble 1; see also Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the EC Internal Market (1999/C 30/04) (Text with EEA relevance) COM(1998) 586 final - 98/0325(COD) (Submitted by the Comm'n on 23 Dec. 1998), 1999 O.J. (C 030), 4, Preamble 6 (noting that the EU should ensure a high level of consumer protection).

¹⁹⁸ Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at Art. 14, available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/l32014.htm>>.

¹⁹⁹ Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427] at Preamble 21.

²⁰⁰ *Id.* at Arts. 2(e), 2(a)(2)(1), 2(a)(2)(2); see Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the EC Internal Market (1999/C 30/04) (Text with EEA relevance) COM(1998) 586 final - 98/0325(COD) (Submitted by the Comm'n on 23 Dec. 1998), 1999 O.J. (C 030), 4, Ch. 1, Art 2(1) (defining commercial communications); Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, Preambles 4, 12, Arts. 2(1), 2(2), 2(3), 2(3)(7)-(9) (describing suspect types of communications), 2(4), 4(3) (requiring disclosures at onset of telephone communication), Annex I, available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/l32014.htm>>; Holly K. Towle, *UCITA Elec. Contracting Principles and Regulatory Overlays*, 563 PLI/Pat 427, 440 (1999); see also Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 328 (1999) (describing the definition of supplier and consumer).

²⁰¹ Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427] at Art 2(f).

commerce “[goods and] services,”²⁰² EU e-commerce policy excludes “direct access” and “non-financial consideration” transactions from its grasp.²⁰³ Yet, an expansive “selling of goods”²⁰⁴ definition covers all other e-commerce activity,²⁰⁵ including “non-occasional”²⁰⁶ financial services.²⁰⁷ Interestingly, while the Contracts Directive excepts auction sales,²⁰⁸ it is questionable

²⁰² *Id.* at Preamble 6; see Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 277 (June 14-15, 1999); see also Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the EC Internal Market (1999/C 30/04) (Text with EEA relevance) COM(1998) 586 final - 98/0325(COD) (Submitted by the Comm'n on 23 Dec. 1998), 1999 O.J. (C 030), 4, at Ch. 1, Art 2(1) (defining information society services).

²⁰³ Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427] at Arts. 2(e), Art 2(e)(1) (defining direct access to electronic services) and Art 2(e)(2) (defining communications of goods, services and images).

²⁰⁴ *Id.* at Preamble 3.

²⁰⁵ See Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L144) at 19, Art. 3(1) and Annex II, available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/l32014.htm>>; Comm'n Recommendation of 7 Apr. 1992 on Codes of Practice for the Protection of Consumers in Respect of Contracts Negotiated at a Distance (Distance Selling), 92/295/EEC, 1992 O.J. (L 156) at 21, Preambles 4-5; Amended Proposal for a Eur. Parl. and Council Directive Concerning the Distance Mktng of Consumer Financial Services and Amending Directives 97/7/EC and 98/27/EC, COM/99/0385, at Art. 2(1), final at COD 99/0245 (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty); Proposal for a Directive of the Eur. Parl. and of the Council Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (98/C 385/10) (Text with EEA relevance) COM(1998) 468 final - 98/0245(COD), 1998 O.J. (C 385) at 10 (defining distance contracts); Elisabeth Logeais, *Roundup of Elec. Commerce in the Eur. Union*, 5 NO. 5 Multimedia Strategist 1, at ¶ 6 (1999); The EU Comm. of the Am. Chamber of Commerce in Belgium, *Business Guide to EU Initiatives 1998/1999*, at ¶ 4 (last visited Sept. 12, 1999) <<http://www.eu.int/>> (defining the distance contract).

²⁰⁶ This period consists of the first financial transaction, regardless of how many transactions take place over a period of time. See Amended Proposal for a Eur. Parl. and Council Directive Concerning the Distance Mktng of Consumer Financial Services and Amending Directives 97/7/EC and 98/27/EC, COM/99/0385, at Art 2(2), final at COD 99/0245 (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty); Comm'n Recommendation of 7 Apr. 1992 on Codes of Practice for the Protection of Consumers in Respect of Contracts Negotiated at a Distance (Distance Selling), 92/295/EEC, 1992 O.J. (L 156) at 21, Art 1(2).

²⁰⁷ Amended Proposal for a Eur. Parl. and Council Directive Concerning the Distance Mktng of Consumer Financial Services and Amending Directives 97/7/EC and 98/27/EC, COM/99/0385, at Arts. 2(2), Art 4(4)(1), 4(4)(2), 4(4)(3), 4(5), Final at COD 99/0245 (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty); Opinion of the Economic and Social Comm. on the 'Green Paper - Financial Services: Meeting Consumers' Expectations, 1997 O.J. (C 56) at 76, § 2.20; Proposal for a Directive of the Eur. Parl. and of the Council Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (98/C 385/10) (Text with EEA relevance) COM(1998) 468 final - 98/0245(COD), 1998 O.J. (C 385) at 10, Art 2(1)(b); see also The EU Comm. of the Am. Chamber of Commerce in Belgium, *Business Guide to EU Initiatives 1998/1999*, at ¶ 3 (last

whether the E-Commerce Directive will exclude it, given the economic importance of Internet auctions.²⁰⁹ Further, while legalizing clickwrapped agreements,²¹⁰ EU policy requires e-businesses to give e-consumers sufficient information to allow for full appreciation of a transaction's risks and benefits,²¹¹ to send e-consumers written²¹² or durable²¹³ confirmations²¹⁴ of e-commerce transactions and to adhere to full contract "transparency"²¹⁵ throughout the agreement process.²¹⁶

visited Sept. 12, 1999) <<http://www.eu.int/>> (discusses the various types of financial services to be addressed).

²⁰⁸ Elisabeth Logeais, *Roundup of Elec. Commerce in the Eur. Union*, 5 NO. 5 Multimedia Strategist 1, at ¶ 6 (1999); see also Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, § 3(3)(1), available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/l32014.htm>>; Michael Chissick, *Will EU Directive Enhance Confidence in Internet Purchases?*, 4 No. 5 Multimedia Strategist 1, 8 (1998) (stating that some financial contracts, vending machines, etc. contracts are executed from the directive).

²⁰⁹ Elisabeth Logeais, *Roundup of Elec. Commerce in the Eur. Union*, 5 NO. 5 Multimedia Strategist 1, at ¶ 6 (1999).

²¹⁰ Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427], at Art 11(1)(1).

²¹¹ See *id.* at Art 6; Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 327-8 (1999).

²¹² While the Distance Contracts (Selling) Directive requires written confirmations, it is not known if the Ecom Directive will allow e-mailed confirmations since the confirmation has to be in a durable form. Further, the Distance Contracts (Selling) Directive requires this confirmation to be sent, at the latest, when the goods are delivered. See Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 328-9 (1999); Elisabeth Logeais, *Roundup of Elec. Commerce in the Eur. Union*, 5 NO. 5 Multimedia Strategist 1, at ¶ 6 (1999); Michael Chissick, *Will EU Directive Enhance Confidence in Internet Purchases?*, 4 No. 5 Multimedia Strategist 1, 7 (1998).

²¹³ Amended Proposal for a Eur. Parl. and Council Directive Concerning the Distance Mktng of Consumer Financial Services and Amending Directives 97/7/EC and 98/27/EC, COM/99/0385, at Art. 4(1)(1), Final at COD 99/0245 (Presented by the Comm'n Pursuant to Art. 250(2) of the EC-Treaty); see Amending Directives 97/7/EC and 98/27/EC, COM/99/0385, at Art 3a(1), final at COD 99/0245 (Presented by the Comm'n Pursuant to Art. 250(2) of the EC-Treaty) (states that Amendment 21 requires contractual disclosures prior to purchase); Proposal for a Directive of the Eur. Parl. and of the Council Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (98/C 385/10) (Text with EEA relevance) COM(1998) 468 final - 98/0245(COD), 1998 O.J. (C 385) at 10, Art. 29.

²¹⁴ See Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 277 (June 14-15, 1999).

²¹⁵ *Elec. Commerce: Comm'n Proposes Legal Framework*, at ¶ 5 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>>; Alastair Tempest, Director General and Asuncion Caparros, Director Eur. Affairs, FEDMA, *Country of Origin and Ecom - Defending Eur. Consumer and Business Interests*, at ¶ 19 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>>; Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by

Unlike US law, EU policy does not allow for US agency-like enforcement of consumer rights.²¹⁷ Still, EU policy allows member states to proscribe e-commerce activity if “proportionate”²¹⁸ and reasonably “necessary” for e-consumer protection.²¹⁹ Still, the EU’s “home control”

the Council and the Parl. re Art. 6 (1) - Statement by the Comm’n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, Arts. 4(1), 4(2), 5(1)(2) available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/l32014.htm>>; Proposal for a Directive of the Eur. Parl. and of the Council Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (98/C 385/10) (Text with EEA relevance) COM(1998) 468 final - 98/0245(COD), 1998 O.J. (C 385) at 10, Preamble 8, Arts. 2(1)(b) at 29; Opinion of the Economic and Social Comm. on the ‘Green Paper - Financial Services: Meeting Consumers’ Expectations, 1997 O.J. (C 56) at 76, §§ 2.6, 2.14 (noting that consumer information is essential to make informed choices and that, to solve this, disclosure requirements are necessary), 3.5.1; Amended Proposal for a Eur. Parl. and Council Directive Concerning the Distance Mktg of Consumer Financial Services and Amending Directives 97/7/EC and 98/27/EC, COM/99/0385, at Art 3(4), final at COD 99/0245 (Presented by the Comm’n Pursuant to Art. 250 (2) of the EC-Treaty) at Arts. 3(2), 3(a)(3), 3(a)(4); see also The EU Comm. of the Am. Chamber of Commerce in Belgium, *Business Guide to EU Initiatives 1998/1999*, at ¶ 2 (last visited Sept. 12, 1999) <<http://www.eu.int/>> (holding that distance selling finance policy must be accomplished by clear and adequate information disclosures); Mark Owen, *Int’l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 277 (June 14-15, 1999) (describing informational requirements to give consumers more information upon which to make decisions); Bob Tedeschi, *Internet Retailers Hide True Costs of Purchases*, New York Times, Apr. 5, 1999 (last visited Jan. 20, 2000) <<http://www.nytimes.com/library/tech/99/04/cyber/commerce/05commerce.html>>.

²¹⁶ Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm’n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427] at Art 10(1); see Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm’n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, Preamble 12, available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/l32014.htm>>; Holly K. Towle, *UCITA Elec. Contracting Principles and Regulatory Overlays*, 563 PLI/Pat 427, 440 (1999).

²¹⁷ Mark Owen, *Int’l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 278 (June 14-15, 1999)

²¹⁸ Amended Proposal for a Eur. Parl. and Council Directive Concerning the Distance Mktg of Consumer Financial Services and Amending Directives 97/7/EC and 98/27/EC, COM/99/0385 final at COD 99/0245 (Presented by the Comm’n Pursuant to Art. 250 (2) of the EC-Treaty) at Art. 22 and 2(ii)-(iii).

²¹⁹ See Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Elec. Commerce in the Internal Mkt. (Presented by the Comm’n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427], at Preamble 17a (noting the member states may take measures which might restrict freedom to provide Internet services), Arts. 22, 2, 2(b)-(c), 2(i)(a) (noting that member states may inhibit ecom to protect public health, public security and consumer protection), 2(d) (noting that once the Comm’n acts against the ecom emergency, the member state must stop acting); see also Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the EC Internal Market (1999/C 30/04) (Text with EEA relevance) COM(1998) 586 final - 98/0325(COD) (Submitted by the Comm’n on 23 Dec. 1998), 1999 O.J. (C 030), 4 at Ch. III, Art. 19(3) (noting that states may act as quickly as possible to provide assistance to other member states to address health, public security and consumer protection emergencies); *Elec. Commerce: Comm’n Proposes Legal Framework*, at ¶ 12 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>> (noting that states may impose restrictions on Internet activ-

requirements²²⁰ might limit the EU's policy effect²²¹ by binding foreign Internet Service Providers ["ISP"] only if their home jurisdiction has a policy of reciprocity with the EU.²²² Seemingly, if this exception becomes problematic, EU consumer policy will shift to eliminate this foreign

ity for public policy emergencies).

²²⁰ A Eur. Initiative in Elec. Commerce Communication to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions COM(97)157, § III(39)(1) (Apr. 15, 1997) (last visited Sept. 12, 1999) <<http://www.cordis.lu/esprit/src/ecomcomx.htm>>; see Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427] at Preamble 16; Mike Pullen, *The Draft Ecom Directive - Good News for SMEs and Consumer Choice*, at ¶ 2 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>>; see also A Eur. Initiative in Elec. Commerce Communication to the Eur. Parl., the Council, the Economic and Social Comm. and the Comm. of the Regions COM(97)157 § III(39)(2) (Apr. 15, 1997) (last visited Sept. 12, 1999) <<http://www.cordis.lu/esprit/src/ecomcomx.htm>> (noting that regulations should not be adopted for regulation's sake and community law should be adopted where member states do not practice mutual recognition of another member state's strong consumer protections); Jan Howells, *Eur. Ecommerce Regulation Expected Today*, Newswire, Nov. 18, 1998 (Pg. Unavail. Online), available in 1998 WL 23801890 (noting that the country of origin control ecom position was highly criticized); *EU Law Seen as Grave Threat to Ecom* (last visited Sept. 12, 1999) <<http://legalnews.findlaw.com/news/19990910/bctechuinternet.html>> (noting that the Ecom Directive will allow consumers to forum shop for the best jurisdiction to sue e-businesses); Sylvia Pennington, *Eur. Handcuffs Ecommerce With Consumer Rights Laws*, Newswire, Sept. 9, 1999 (Pg. Unavail. Online), available at 1999 WL 6823762 (stating that retailers will be subject to numerous jurisdictions on the Internet – 15 member state and EU laws); Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 324-6 (1999) (noting the country of origin control doctrine in relations to commercial communications and discussing the Ecom Directive and the place of establishment requirement); Alastair Tempest, Director General and Asuncion Caparros, Director Eur. Affairs, FEDMA, *Country of Origin and Ecom - Defending Eur. Consumer and Business Interests*, at ¶ 19 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>> (noting that EU consumers will benefit from where the company is established); John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 916 (Summer 1999) (discussing locations requirement definitions depending upon various circumstances); Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263,m 270 (June 14-15, 1999); John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 937-8 (Summer 1999) (discussing the doctrine of home country control).

²²¹ *Id.* at 939.

²²² Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427] at Preamble 20; see Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the EC Internal Market (1999/C 30/04) (Text with EEA relevance) COM(1998) 586 final - 98/0325(COD) (Submitted by the Comm'n on 23 Dec. 1998), 1999 O.J. (C 030), 4, Preamble 20 (noting that the Directive does not apply to Internet Service Providers from third countries); Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 271, 284 (June 14-15, 1999); see also Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 325 (1999) (discusses the Ecom Directive and the place of establishment requirement; John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 916 (Summer 1999) (discussing locations requirement definitions depending upon various circumstances).

ISP exception.²²³ Still, one can see how EU policy will effect EU and US e-commerce activity. With such limitations, US business interests are concerned.

While allowing some self-regulation through professional codes of conduct for professional “parties,”²²⁴ EU policy guarantees e-consumers remedies for wrongful or illegal e-business activity,²²⁵ such as arbitration²²⁶ or court remedies,²²⁷ initiated by individuals, consumer organiza-

²²³ Written Question No. 410/98 by Giacomo Leopardi , Guido Viceconte , Elena Marinucci to the Comm'n. Sale of medicines over the Internet, 1998 O.J. (C 323) at 34(11).

²²⁴ Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427] at Art 10(3); see Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, at Art. 11(4), available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/132014.htm>>; Alastair Tempest, Director General and Asuncion Caparros, Director Eur. Affairs, FEDMA, *Country of Origin and Ecom - Defending Eur. Consumer and Business Interests*, at ¶ 19 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>>.

²²⁵ Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427] at Art 10(3).

²²⁶ *Id.* at Art. 17(1)-(2); see Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the EC Internal Market (1999/C 30/04) (Text with EEA relevance) COM(1998) 586 final - 98/0325(COD) (Submitted by the Comm'n on 23 Dec. 1998), 1999 O.J. (C 030), 4, at Ch. III, Art. 17 (noting that courts may allow out-of-court settlement options, but not to the detriment of court remedies); Opinion of the Economic and Social Comm. on the 'Green Paper - Financial Services: Meeting Consumers' Expectations, 1997 O.J. (C 56) at 76, § 3.5.4 (stating that consumers must have a right to Seek a remedy for compensation and that this right of redress should include internal procedures to handle claims).

²²⁷ Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427] at Art 18(1)-(2); Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, Art. 11(1)-(2), available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/132014.htm>>; Opinion of the Economic and Social Comm. on the 'Green Paper - Financial Services: Meeting Consumers' Expectations, 1997 O.J. (C 56) at 76, §§ 2.8, 3.5.3 (stating that consumers must have a right to Seek a remedy for compensation and that this right of redress should include internal procedures to handle claims); Council Resolution of 19 Jan. 1999 on the Consumer Dimension of the Info. Soc'y, 1999 O.J. (C 023) at 1, Preambles 4, 7 (1999/C 23/01); Alastair Tempest, Director General and Asuncion Caparros, Director Eur. Affairs, FEDMA, *Country of Origin and Ecom - Defending Eur. Consumer and Business Interests*, at ¶ 19 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>>; see also Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the EC Internal Market (1999/C 30/04) (Text with EEA relevance) COM(1998) 586 final - 98/0325(COD) (Submitted by the Comm'n on 23 Dec. 1998), 1999 O.J. (C 030), 4, at Ch. III, Art. 18 (noting that member states are to ensure a consumer's right to sue in court even with alternative dispute mechanisms).

tions or public bodies²²⁸ and with liabilities assessed by member state law.²²⁹ Further, unless agreed otherwise, all deliveries must occur within thirty days from order.²³⁰ Most importantly, EU e-commerce policy grants e-consumer's seven to thirty days to contemplate²³¹ whether to withdrawal²³² from the contract,²³³ for any reason,²³⁴ without incurring charges²³⁵ or penalties²³⁶

²²⁸ Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, Art. 11(1)-(2), available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/l32014.htm>>.

²²⁹ Amended Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Mkt. (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty), COM/99/0427 final at COD 98/0325 [continued from 599PC0427] at Art. 21; see Proposal for a Eur. Parl. and Council Directive on Certain Legal Aspects of Electronic Commerce in the EC Internal Market (1999/C 30/04) (Text with EEA relevance) COM(1998) 586 final - 98/0325(COD) (Submitted by the Comm'n on 23 Dec. 1998), 1999 O.J. (C 030), 4, at Ch. III, Art. 21 (noting that member states are to determine sanctions and fines for violations of the Ecom Directive); Mike Pullen, *The draft Ecom Directive - Good News for SMEs and Consumer Choice*, at ¶ 11 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>>; see also *Elec. Commerce: Comm'n Proposes Legal Framework* (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/>> (noting that member states must mutually recognize the greater consumer protections within other member states).

²³⁰ Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, Art. 7(1) and Preamble 15, available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/l32014.htm>>; see also Ben Goodger, *Cyber-space - Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 330 (1999) (discusses performance within 30 days as required by the Directive); Michael Chissick, *Will EU Directive Enhance Confidence in Internet Purchases?*, 4 No. 5 Multimedia Strategist 1, 8 (1998) (noting performance requirements).

²³¹ Please note that the withdrawal period for non-financial services transaction is seven days; whereas, the time period for financial service contracts is fourteen to thirty days. See Amended Proposal for a Eur. Parl. and Council Directive Concerning the Distance Mktng of Consumer Financial Services and Amending Directives 97/7/EC and 98/27/EC, COM/99/0385, at Arts. 4(1), 4(1)(2), 4(2) and 4(3), final at COD 99/0245 (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty).

²³² The EU Comm. of the Am. Chamber of Commerce in Belgium, *Business Guide to EU Initiatives 1998/1999*, at ¶ 5 (last visited Sept. 12, 1999) <<http://www.eu.int/>>; see Proposal for a Directive of the Eur. Parl. and of the Council Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (98/C 385/10) (Text with EEA relevance) COM(1998) 468 final - 98/0245(COD), 1998 O.J. (C 385) at 10, Art. 6(1)(2).

²³³ Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, Arts. 6(4)(1)-(2), 8, available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/l32014.htm>>; see Proposal for a Directive of the Eur. Parl. and of the Council Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (98/C 385/10) (Text with EEA relevance) COM(1998) 468 final - 98/0245(COD), 1998 O.J. (C 385) at 10, Preamble 16; Amended Proposal for a Eur. Parl. and Council Directive Concerning the Distance Mktng of Consumer

other than return costs.²³⁷ An e-business's failure to be transparent in its contract negotiations²³⁸ will extend this contemplation period up to three months.²³⁹ An e-business's²⁴⁰ failure to deliver goods within the time allotted to deliver the goods²⁴¹ or practicing banned inertia selling²⁴² may

Financial Services and Amending Directives 97/7/EC and 98/27/EC, COM/99/0385 final at COD 99/0245 (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty) at Art 4(3); Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 329-30 (1999).

²³⁴ Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, Art. 6(1)(1), Preamble 14, available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/132014.htm>>.

²³⁵ Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 277 (June 14-15, 1999).

²³⁶ Proposal for a Directive of the Eur. Parl. and of the Council Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (98/C 385/10) (Text with EEA relevance) COM(1998) 468 final - 98/0245(COD), 1998 O.J. (C 385) at 10, Preamble 18.

²³⁷ Note that in financial services contracts, consumers may be required to pay for pro rata service charges. If the e-business fails to give the e-consumer proper information, the e-consumer may not be required to pay any charges. See Proposal for a Directive of the Eur. Parl. and of the Council Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (98/C 385/10) (Text with EEA relevance) COM(1998) 468 final - 98/0245(COD), 1998 O.J. (C 385) at 10, Art 5(1)(a)-9(b), 5(2)(2); Elisabeth Logeais, *Roundup of Elec. Commerce in the Eur. Union*, 5 NO. 5 Multimedia Strategist 1, at ¶ 6 (1999); see also Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, Art. 6(2), available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/132014.htm>>.

²³⁸ Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, Preamble 19, available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/132014.htm>>;

²³⁹ Amended Proposal for a Eur. Parl. and Council Directive Concerning the Distance Mktng of Consumer Financial Services and Amending Directives 97/7/EC and 98/27/EC, COM/99/0385 final at COD 99/0245 (Presented by the Comm'n Pursuant to Art. 250 (2) of the EC-Treaty) at Art 6(1)(3)-(4).

²⁴⁰ Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, Art. 7(2), available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/132014.htm>>.

²⁴¹ *Id.* at Art. 6(3); see Bob Tedeschi, *Fulfilling Orders is a Challenge for Many Internet Companies*, New York Times, Sep. 27, 1999 <<http://www.nytimes.com/library/tech/99/09/cyber/commerce/27commerce.html>>.

²⁴² Where sellers send un-requested goods or services to consumers in hopes that they purchase the item. See Proposal for a Directive of the Eur. Parl. and of the Council Concerning the Distance Marketing of Con-

result in substantial performance, required refunds²⁴³ of all sums paid,²⁴⁴ equivalent substitutions²⁴⁵ or more. Interestingly, consumers cannot waive or contract these rights away.²⁴⁶ Yet, some state that these rights, like the right of withdrawal, will interfere with e-commerce by forcing e-commerce's instantaneous nature to slow down for real-world commercial requirements to catch up.²⁴⁷ Yet, this falls upon hollow ears.

2. US E-Commerce Concerns

a) US Pro-e-business Policies

The Internet's promise ... [is] coupled with the potential for fraud and deception. Fraud is opportunistic, and fraud operators are always among the first to appreciate the potential of a new technology.²⁴⁸

US policy focuses mainly on e-business self-regulation²⁴⁹ and cyber-crime interdiction.²⁵⁰ Stifled by its intention to foster e-commerce "growth and innovation,"²⁵¹ US e-commerce pol-

sumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (98/C 385/10) (Text with EEA relevance) COM(1998) 468 final - 98/0245(COD), 1998 O.J. (C 385) at 10, Preamble 18; Elisabeth Logeais, *Roundup of Elec. Commerce in the Eur. Union*, 5 NO. 5 Multimedia Strategist 1 (1999).

²⁴³ Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 278 (June 14-15, 1999).

²⁴⁴ Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 330 (1999).

²⁴⁵ Directive 97/7/EC of the Eur. Parl. and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parl. re Art. 6 (1) - Statement by the Comm'n re Art. 3 (1), first indent, 1997 O.J. (L.144) at 19, Art. 7(3) and Preamble 16, available at (last visited Sept. 12, 1999) <<http://europa.eu.int/scadplus/leg/en/lvb/l32014.htm>>.

²⁴⁶ *Id.* at Art. 12.

²⁴⁷ Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 278 (June 14-15, 1999).

²⁴⁸ The FTC on 'Internet Fraud' Before the Subcommittee on Investigations of the Gov'tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 3 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

²⁴⁹ William J. Clinton, *Memorandum for the Heads of Executive Dep'ts and Agencies*, at ¶¶ 10, 12(1) (July 1, 1997) (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/presiden.htm>>; see Robert Burns, *Clinton Promotes Interstate Commerce*, The Orange County Register, Dec. 1, 1998, at C03, available at 1998 WL 21282235; *Clinton Lends Support to Ecom Steps Include Push Against Net Fraud*, Chic. Trib., Dec. 1, 1998 (Pg. Unavail. Online), available at 1998 WL 2921497; *Clinton Administration Pushes for Better Protection Against Cyber-Fraud*, J. Rec., Dec. 1, 1998 (Pg. Unavail. Online), available at 1998 WL 11962162; Robert Burns, *Clinton Touts Online Commerce Consumer Safeguards Among Steps Promised*, San Diego Union & Trib., Dec. 1, 1998, at C2, available at 1998 WL 200623331; Robert MacMillan, *US Will Follow Web Sales And Pursue Self-Regulation*, Newsbytes, Feb. 5, 1999 (Pg. Unavail. Online) at ¶¶ 1, 4, 6 available at 1999 WL 5118700; *Info. Soc'y: Comm'n Launches Debate on Virtual World*, Eur. Report, Feb. 4, 1998, at No. 2288, at ¶ 3.

²⁵⁰ See Robert Burns, *Clinton Promotes Interstate Commerce*, The Orange County Register, Dec. 1, 1998, at C03,

icy²⁵² is pro-business²⁵³ and minimalist²⁵⁴ even in the face of consumer complaints.²⁵⁵ US e-commerce policy “refrain[s or eliminates²⁵⁶] ... new [or] unnecessary regulations, bureaucratic

available at 1998 WL 21282235; *Clinton Lends Support to Ecom Steps Include Push Against Net Fraud*, Chic. Trib., Dec. 1, 1998 (Pg. Unavail. Online), available at 1998 WL 2921497; Robert Burns, *Clinton Touts Online Commerce Consumer Safeguards Among Steps Promised*, San Diego Union & Trib., Dec. 1, 1998, at C2, available at 1998 WL 20062333; see also *Clinton Administration Pushes for Better Protection Against Cyber-Fraud*, J. Rec., Dec. 1, 1998 (Pg. Unavail. Online), available at 1998 WL 11962162.

²⁵¹ Aaron Zitner, *Clinton Calls for Better Internet Commerce Seeks Better Fraud, Privacy Protections to Encourage On-line Shopping*, Boston Globe, Dec. 1, 1998, at C7, at ¶ 4, available at 1998 WL 22237135.

²⁵² See Prepared Statement of the FTC on ‘Consumer Protection in Cyberspace Combating Fraud on the Internet’ Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Comm. on Commerce United States House of Representatives, Washington, D.C. June 25, 1998, at I(C)(2) (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; William J. Clinton, *Memorandum for the Heads of Executive Dep’ts and Agencies*, at ¶¶ 12(3), 12(4) (July 1, 1997) (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/presiden.htm>>; William J. Clinton, *President Clinton Delivers Remarks at Elec. Commerce Event, Nov. 30, 1998*, at E.T. 12:39 (verbatim transcript) (last visited Sept. 12, 1999) <<http://www.whitehouse.gov/>>; Office of the Press Secretary, White House, *Text of the President’s Message to Internet Users*, July 1, 1997 (last visited Sept. 12, 1999) <<http://www.whitehouse.gov/WH/New/Commerce/message.html>>; Robert Burns, *Clinton Touts Online Commerce Consumer Safeguards Among Steps Promised*, San Diego Union & Trib., Dec. 1, 1998, at C2, available at 1998 WL 20062333; *Cyberspace: Who Will Make the Rules? Commerce’s William Daley on Privacy and Taxes*, Bus. Wk., Mar. 22, 1999, at 30D, at ¶ 3, available at 1999 WL 8226544; see also *Clinton Administration Pushes for Better Protection Against Cyber-Fraud*, J. Rec., Dec. 1, 1998 (Pg. Unavail. Online), available at 1998 WL 11962162; *Clinton Lends Support to Ecom Steps Include Push Against Net Fraud*, Chic. Trib., Dec. 1, 1998 (Pg. Unavail. Online), available at 1998 WL 2921497. (describing Clinton’s announcement that U.S. and Australian governments had a common Internet approach).

²⁵³ William M. Daley, U.S. Secretary of Commerce, *The Administration’s Position on Elec. Commerce: Let Mkts., Not Regulations, Define How Elec. Commerce Matures* (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/16.htm>>; see *Clinton Lends Support to Ecom Steps Include Push Against Net Fraud*, Chic. Trib., Dec. 1, 1998 (Pg. Unavail. Online), available at 1998 WL 2921497; *Clinton Administration Pushes for Better Protection Against Cyber-Fraud*, J. Rec., Dec. 1, 1998 (Pg. Unavail. Online), available at 1998 WL 11962162; Robert Burns, *Clinton Touts Online Commerce Consumer Safeguards Among Steps Promised*, San Diego Union & Trib., Dec. 1, 1998, at C2, available at 1998 WL 20062333; Aaron Zitner, *Clinton Calls for Better Internet Commerce Seeks Better Fraud, Privacy Protections to Encourage On-line Shopping*, Boston Globe, Dec. 1, 1998, at C7, at ¶ 18, available at 1998 WL 22237135; see also Robert MacMillan, *FTC Plans Ecom Safety Workshop*, Newsbytes, Dec. 14, 1998 (Pg. Unavail. Online), available at 1998 WL 20720237 (noting that the Clinton administration is taking a liberal approach toward Internet policy).

²⁵⁴ See Proceedings and Debates Regarding Congress and the Internet, In House of Representatives, 105th Congress, 2nd Sess., 144 Cong. Rec. E223-02, E223-4 (Feb. 25, 1998) (statement of Hon. Lee H. Hamilton of Indiana), available at 1998 WL 77700 (Cong.Rec.); William J. Clinton, *Memorandum for the Heads of Executive Dep’ts and Agencies*, at ¶ 10 (July 1, 1997) (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/presiden.htm>>; White House, *President Clinton: Leading the World into the Info. Age*, at ¶ 5 (last visited at Sept. 12, 1999) <<http://www.whitehouse.gov/WH/Work/113098.html>>; Robert Burns, *Clinton Promotes Interstate Commerce*, The Orange County Register, Dec. 1, 1998, at C03, available at 1998 WL 21282235; Aaron Zitner, *Clinton Calls for Better Internet Commerce Seeks Better Fraud, Privacy Protections to Encourage On-line Shopping*, Boston Globe, Dec. 1, 1998, at C7, at ¶ 2, available at 1998 WL 22237135 (noting that

procedures or taxes and tariffs on” e-commerce transactions.²⁵⁷ Unlike EU regulations, the US creates “incentives” for e-businesses to “offer” consumers protection rather than adopting highly protective rights.²⁵⁸ Yet, the US adheres to this incentive-based self-regulation without a grasp of how effective self-regulation will be achieved or implemented.²⁵⁹

To achieve this, White House officials said they plan to prod the industry to adopt a series of self-regulatory measures. These include the creation of a common seal that consumers can look for from companies that have pledged to treat consumers fairly, respond quickly to complaints and agree to arbitration or audits by an outside organization.²⁶⁰

Noting the industry’s difficulty in adopting self-regulatory techniques, quick enforcement of self-regulatory policies seems less than realistic.²⁶¹ Unlike EU policies, US policies leave e-consumers with little recourse for e-commerce harm.²⁶²

Compared to the EU, the US²⁶³ has relatively few consumer protection laws.²⁶⁴ While contract law²⁶⁵ and the Uniform Commercial Code²⁶⁶ do provide some consumer protections, these

Clinton called for consumer protections to come from the industry and not from government); *see also* Elec. Commerce Coordinating Council, *A Joint Resolution On Elec. Commerce by the Elec. Commerce* (last visited Sept. 12, 1999) <<http://www.doc.gov/ecommerce/eccc.htm>> (noting that government should apply a minimalist approach toward Internet regulation); John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 949-50 (Summer 1999) (noting that contract law does not adequately protect consumers).

²⁵⁵ See William J. Clinton, *President Clinton Delivers Remarks at Elec. Commerce Event, Nov. 30, 1998*, at E.T. 12:39, at ¶ 5 (verbatim transcript) (last visited Sept. 12, 1999) <<http://www.whitehouse.gov/>>; *Cyberspace: Who Will Make the Rules? Commerce's William Daley on Privacy and Taxes*, Bus. Wk., Mar. 22, 1999, at 30D, at ¶ 8, available at 1999 WL 8226544.

²⁵⁶ See William J. Clinton, *President Clinton Delivers Remarks at Elec. Commerce Event, Nov. 30, 1998*, at E.T. 12:39, at ¶ 12(4) (verbatim transcript) (last visited Sept. 12, 1999) <<http://www.whitehouse.gov/>>.

²⁵⁷ *Id.* at ¶ 12(2); *see Cyberspace: Who Will Make the Rules? Commerce's William Daley on Privacy and Taxes*, Bus. Wk., Mar. 22, 1999, at 30D, at ¶ 7, available at 1999 WL 8226544.

²⁵⁸ William J. Clinton, *President Clinton Delivers Remarks at Elec. Commerce Event, Nov. 30, 1998*, at E.T. 12:39, at ¶¶ 6, 7, and E.T. 12:40, at ¶¶ 1, 2 (verbatim transcript) (last visited Sept. 12, 1999) <<http://www.whitehouse.gov/>>.

²⁵⁹ See Greg Miller, *Clinton Pushes Initiatives for Elec. Commerce*, L.A. Times, Dec. 1, 1998, at C3, at ¶¶ 1-5; *see* Aaron Zitner, *Clinton Calls for Better Internet Commerce Seeks Better Fraud, Privacy Protections to Encourage On-line Shopping*, Boston Globe, Dec. 1, 1998, at C7, at ¶¶ 16-17, available at 1998 WL 22237135.

²⁶⁰ See Greg Miller, *Clinton Pushes Initiatives for Elec. Commerce*, L.A. Times, Dec. 1, 1998, at C3, at ¶ 6.

²⁶¹ See William M. Daley, U.S. Secretary of Commerce, *The Administration's Position on Elec. Commerce: Let Mkts., Not Regulations, Define How Elec. Commerce Matures* (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/16.htm>>; *Cyberspace: Who Will Make the Rules? Commerce's William Daley on Privacy and Taxes*, Bus. Wk., Mar. 22, 1999, at 30D, at ¶ 6, available at 1999 WL 8226544.

²⁶² Greg Miller, *Clinton Pushes Initiatives for Elec. Commerce*, L.A. Times, Dec. 1, 1998, at C3, at ¶ 7.

²⁶³ Noting that states do provide consumers with some protections. *See Vacco v. Lipsitz*, 663 N.Y.S.2d 468

laws are not “panacea[s]” addressing e-consumer interests.²⁶⁷ While their enforcement creates “confiden[ce]” in contracts,²⁶⁸ the Internet’s clickwrapped²⁶⁹ contracts, especially “shrink-wrap[ped]”²⁷⁰ licensing agreements, create extreme imbalances in e-business and e-consumer negotiating relationships. In *ProCD, Inc. v Zeidenberg*, the 7th Circuit held that a “shrinkwrap[ped] license”²⁷¹ was valid even though the e-consumer had no opportunity to read or negotiate the agreement’s terms prior to acceptance.²⁷² In *Hill v. Gateway*, the 7th Circuit went further, by enforcing a “shrinkwrap[ped] license” even though the e-business had purposefully hidden an arbitration clause within the contract.²⁷³ The court stated that e-consumers “were not entitled to pick and choose” which license term “would be enforceable.”²⁷⁴ In *Brower v. Gateway 2000, Inc.*, a

(1997); Haw. Bill Senate S.B. No. 651 S.D. 1 (1999); Holly K. Towle, *UCITA Elec. Contracting Principles and Regulatory Overlays*, 563 PLI/Pat 427, 431 (1999); Ilene Knable Gotts, et al., *Dev.s in Consumer Protection: Enforcers Get Tough on Fraudulent and Deceptive Practices in Telecommunications Services*, 11-SUM Antitrust 39, 42, 42 n.33 (1997); Dee Pridgen, *How Will Consumers Be Protected on the Info. Superhighway?*, 32 Land & Water L. Rev. 237, 248-9 (1997); Fred M. Greguras, et al., *Elec. Commerce: On-Line Contract Issues*, 452 PLI/Pat 11, 22-3 (Sept. 1996); Jeffrey M. Reisner, *Cal. Extends Consumer Protection to Business on the Internet*, 3 NO. 4 Multimedia Strategist 5 (1997); Steve Johnson, *Promotion by Cal. Ecom Co. Onsale under Investigation*, Knight-Ridder Trib. Bus. News, Apr. 28, 1999 (Pg. Unavail. Online) at ¶ 1, available at 1999 WL 17333724; *Internet Laws Seen On-Line in States*, The Washington Times, Jan. 18, 2000 (last visited Jan. 20, 2000) <http://zdecom.newsreal.com/osform/NewsService?osform_template=pages/zdecomStory&ID=zedecom&path=News/Story_2000_01_18.NRdb@2@17@3@1690>.

²⁶⁴ Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887, 888-9 (Summer 1998).

²⁶⁵ John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 949 (Summer 1999).

²⁶⁶ See White House, *A Framework for Global Elec. Commerce*, at II(3)(4) (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/framework.htm>>; Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887, 888 (Summer 1998).

²⁶⁷ *Id.* at 889.

²⁶⁸ *Id.*

²⁶⁹ Holly K. Towle, *UCITA Elec. Contracting Principles and Regulatory Overlays*, 563 PLI/Pat 427, 429 (1999).

²⁷⁰ *Id.* at 442.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ Holly K. Towle, *On-Line: Selected Issues in Contracts*, 557 PLI/Pat 715, 732 n.18 (Apr. 29-30, 1999); see also Holly K. Towle, *UCITA Elec. Contracting Principles and Regulatory Overlays*, 563 PLI/Pat 427, 442-3 (1999) (stating that the vendor in *Gateway* chose to allow the buyer to return the product in 30 days, thus escaping other consumer protection requirements).

²⁷⁴ See Holly K. Towle, *On-Line: Selected Issues in Contracts*, 557 PLI/Pat 715, 732 n.18 (Apr. 29-30, 1999); see also Holly K. Towle, *UCITA Elec. Contracting Principles and Regulatory Overlays*, 563 PLI/Pat 427, 442-3 (1999) (stating that in *Hill v. Gateway* the court enforced shrinkwrap agreements and held that buyers could not pick and choose which license agreement clauses they agreed with).

New York court adopted the *Gateway* approach and held that the imbalanced e-business and e-consumer relationship combined with an e-consumer's inability to read contract terms did not create an adhesion contract, stating that, at any time, an e-consumer could return the goods to the e-business at the consumer's expense.²⁷⁵ Lastly, in *M.A. Mortenson Company, Inc. v. Timberline Software Corporation*, the court held that an e-business could sell software products bound with "disclaimed warranties, limited remedies, [] ... choice of law and forum selection clauses"²⁷⁶ without informing the e-consumer of those limitations.²⁷⁷ Given the Internet's nature, it might be questionable whether these extreme positions further e-consumer protections or consumer confidence in e-commerce.

In each instance, these e-businesses would have violated EU e-consumer protection laws, such as those requiring contract transparency.²⁷⁸ If so, the e-businesses might have been subject to substantial performance demands, damages or more court-related remedies.²⁷⁹ While the EU tries to utilize consumer protection laws to address the imbalance of economic power between the e-business and e-consumer, the US does not pretend or try to do so. The US counters by claiming that the Internet's rapidly changing technology would quickly "outstrip[] and outdate[]" any consumer protection laws²⁸⁰ and that government can do little to effect consumer protection except when fighting cybercrime.²⁸¹

b) *US Cyber-Crime*

Basically, I equate the Internet to the Wild West. It is frontier land out there.²⁸²

When addressing cyber-crime,²⁸³ the US, mainly via the Federal Trade Commission ["FTC"],²⁸⁴ does have highly punitive policies²⁸⁵ against deceptive business practices²⁸⁶ that "gain

²⁷⁵ Holly K. Towle, *UCITA Elec. Contracting Principles and Regulatory Overlays*, 563 PLI/Pat 427, 442-3 (1999); see also Holly K. Towle, *On-Line: Selected Issues in Contracts*, 557 PLI/Pat 715, 728, 733 (Apr. 29-30, 1999) (stating that the N.Y. allowed "rolling contracts" where full contract terms are not Seen at "first stage of a transaction.").

²⁷⁶ *Id.* at 732; see also Holly K. Towle, *UCITA Elec. Contracting Principles and Regulatory Overlays*, 563 PLI/Pat 427, 443 (1999) (noting that Mortenson's licenses were similar to Timberline's contracts for they both limited consumer options to obtain remedies).

²⁷⁷ Holly K. Towle, *On-Line: Selected Issues in Contracts*, 557 PLI/Pat 715, 732 (Apr. 29-30, 1999).

²⁷⁸ See *id.* n.211-215.

²⁷⁹ See *id.* n.242-245

²⁸⁰ Robert MacMillan, *US Will Follow Web Sales And Pursue Self-Regulation*, Newsbytes, Feb. 5, 1999 (Pg. Unavail. Online) at ¶ 7, available at 1999 WL 5118700.

²⁸¹ See Greg Miller, *Clinton Pushes Initiatives for Elec. Commerce*, L.A. Times, Dec. 1, 1998, at C3, ¶ 10.

²⁸² Lauren Coleman-Lochner, *Retail Scams Lurk Among Cybershopping Sites*, Austin Am.-Statesman, Jan. 19, 1999, at D2, at ¶¶ 1-2, available at 1999 WL 7400043.

²⁸³ See Robert Burns, *Clinton Promotes Interstate Commerce*, The Orange County Register, Dec. 1, 1998, at C03, available at 1998 WL 21282235; *Clinton Lends Support to Ecom Steps Include Push Against Net Fraud*, Chic. Trib.,

a leg up on their competitors by [fraudulently²⁸⁷] cutting a few legal corners[.],”²⁸⁸ thus “distorting” the market.²⁸⁹ As in the real world, legitimate e-businesses and shams have equal access to e-consumers; yet, unlike the real world, the Internet provides an “inexpensive and efficient way [for perpetrators] to reach vast numbers”²⁹⁰ of potential victims²⁹¹ and allows perpetrators to

Dec. 1, 1998 (Pg. Unavail. Online), available at 1998 WL 2921497; *Clinton Administration Pushes for Better Protection Against Cyber-Fraud*, J. Rec., Dec. 1, 1998 (Pg. Unavail. Online), available at 1998 WL 11962162; Robert Burns, *Clinton Touts Online Commerce Consumer Safeguards Among Steps Promised*, San Diego Union & Trib., Dec. 1, 1998, at C2, available at 1998 WL 20062333.

²⁸⁴ Note that other agencies include the FDA, FBI and FCC, but the FTC is more vigilant in its efforts. See Fed. Bureau of Investigation Before Subcommittee on Technology, Terrorism, and Gov'tal Info. Comm. on the Judiciary United States Senate Washington, D.C., *Internet Crimes Affecting Consumers*, 1997 WL 8220325, at * ¶¶ 18-20 (Mar. 19, 1997) (statement of Charles L. Owens, Chief, Financial Crimes Section); Donna M. Lampert, et al., *Overview of Internet Legal and Regulatory Issues*, 544 PLI/Pat 179, 186 (Dec. 1998); *Commerce Dep't to Publish Internet Sales Figures*, L.A. Times, Feb. 6, 1999, at C2, available at 1999 WL 2127347; Dee Pridgen, *How Will Consumers Be Protected on the Info. Superhighway?*, 32 Land & Water L. Rev. 237, 250 (1997); *Cyberspace: Who Will Make the Rules? Commerce's William Daley on Privacy and Taxes*, Bus. Wk., Mar. 22, 1999, at 30D, at ¶ 3, available at 1999 WL 8226544.

²⁸⁵ White House, *President Clinton: Leading the World into the Info. Age*, at ¶ 5 (last visited at Sept. 12, 1999) <<http://www.whitehouse.gov/WH/Work/113098.html>>.

²⁸⁶ See Aaron Zitner, *Clinton Calls for Better Internet Commerce Seeks Better Fraud, Privacy Protections to Encourage On-line Shopping*, Boston Globe, Dec. 1, 1998, at C7, at ¶ 9, available at 1998 WL 22237135; Robert MacMillan, *US Will Follow Web Sales And Pursue Self-Regulation*, Newsbytes, Feb. 5, 1999 (Pg. Unavail. Online) at ¶ 3, available at 1999 WL 5118700.

²⁸⁷ Aaron Zitner, *Clinton Calls for Better Internet Commerce Seeks Better Fraud, Privacy Protections to Encourage On-line Shopping*, Boston Globe, Dec. 1, 1998, at C7, at ¶ 9, available at 1998 WL 22237135.

²⁸⁸ Steve Johnson, *Promotion by Cal. Ecom Co. Onsale under Investigation*, Knight-Ridder Trib. Bus. News, Apr. 28, 1999 (Pg. Unavail. Online), available at 1999 WL 17333724, at * ¶ 10.

²⁸⁹ *Id.* at * ¶ 11; see Prepared Statement of the FTC on 'Consumer Protection in Cyberspace Combating Fraud on the Internet' Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Comm. on Commerce United States House of Representatives, Washington, D.C. June 25, 1998, at I(B)(2)(3) (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; Dee Pridgen, *How Will Consumers Be Protected on the Info. Superhighway?*, 32 Land & Water L. Rev. 237, 248, 250 (1997); Bill Pietrucha, *FTC Says Fraud Could Slow Ecom Growth*, Newsbytes, June 26, 1998 (Pg. Unavail. Online) at ¶ 4, available at 1998 WL 1172366; see also Prepared Statement of the FTC on 'Internet Fraud' Before the Subcommittee on Investigations of the Gov'tal Affairs Comm., United States Senate, 1998 WL 12762604 at * ¶ 6 (Feb. 10, 1998) (Pg. Unavail. Online) (statement of Robert Pitofsky) (detailing the history of the 900-number enforcement to form an analogy for Internet enforcement activity) and I(B)(4) (arguing that FTC action is important to ensure that fraud does not discourage consumers from using the Internet and “choking” off Internet growth).

²⁹⁰ Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 3 (1999); see also The FTC on 'Internet Fraud' Before the Subcommittee on Investigations of the Gov'tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, ¶ 4 (last visited Sept. 12, 1999) <<http://www.ftc.gov>> (noting that the Internet provides great opportunities at little or no cost and results in potential for big profits).

convincingly²⁹² “masquerade”²⁹³ as “legitimate business[es].”²⁹⁴ “You can reach a whole lot more potential customers or suckers, easily and inexpensively.”²⁹⁵ The US works to ensure that shoppers are safe in the “virtual [shopping] mall”²⁹⁶ but does not protect the e-consumer from tricky businessmen.

A box of rocks carefully weighted and styrofoamed to handle like a brand new computer is what one hapless Internet shopper received at the front door. A doll collector in Red Deer recently shelled out big bucks on-line for a rare Barbie that arrived nearly bald. Tales of woe abound in the new digital marketplace, which is populated by mystery merchants and affords little to no protection for cyberspace customers.²⁹⁷

While assuring that e-commerce is “safer than the real world,”²⁹⁸ authorities admit that e-consumer complaints have “risen dramatically.”²⁹⁹ The FTC has received up to 200 e-consumer

²⁹¹ See Steve Johnson, *Promotion by Cal. Ecom Co. Onsale Under Investigation*, Knight-Ridder Trib. Bus. News, Apr. 28, 1999 (Pg. Unavail. Online) at ¶ 9, available at 1999 WL 17333724.

²⁹² Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 5 (1999).

²⁹³ Lauren Coleman-Lochner, *Retail Scams Lurk Among Cybershopping Sites*, Austin Am.-Statesman, Jan. 19, 1999, at D2, at ¶ 5, available at 1999 WL 7400043.

²⁹⁴ Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 5 (1999).

²⁹⁵ See Lauren Coleman-Lochner, *Retail Scams Lurk Among Cybershopping Sites*, Austin Am.-Statesman, Jan. 19, 1999, at D2, at ¶ 6, available at 1999 WL 7400043.

²⁹⁶ Robert Burns, *Clinton Touts Online Commerce Consumer Safeguards Among Steps Promised*, San Diego Union & Trib., Dec. 1, 1998, at C2, available at 1998 WL 20062333; see Robert Burns, *Clinton Promotes Interstate Commerce*, The Orange County Register, Dec. 1, 1998, at C03, available at 1998 WL 21282235; *Clinton Lends Support to Ecom Steps Include Push Against Net Fraud*, Chic. Trib., Dec. 1, 1998 (Pg. Unavail. Online), available at 1998 WL 2921497; *Clinton administration pushes for better protection against cyber-fraud*, J. Rec., Dec. 1, 1998 (Pg. Unavail. Online), available at 1998 WL 11962162.

²⁹⁷ *Consumer Groups Take OECD to Task on Net Protection*, The Edmonton Sun, Oct. 8, 1998 (Pg. Unavail. Online), available at 1998 WL 19790597.

²⁹⁸ See *Internet Purchases are Safer Than Phone, at Least for Now*, The Orange County Register, Aug. 22, 1999, at K05, available at 1999 WL 4315903.

²⁹⁹ Steve Johnson, *Promotion by Cal. Ecom Co. Onsale under Investigation*, Knight-Ridder Trib. Bus. News, Apr. 28, 1999 (Pg. Unavail. Online), available at 1999 WL 17333724, at * ¶ 6; see Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 5 (1999); Lauren Coleman-Lochner, *Retail Scams Lurk Among Cybershopping Sites*, Austin Am.-Statesman, Jan. 19, 1999, at D2, at ¶¶ 9, 10, available at 1999 WL 7400043 (noting that cyberfraud is growing faster than ecom itself); see also *Internet Purchases are Safer Than Phone, at Least for Now*, The Orange County Register, Aug. 22, 1999, at K05, available at 1999 WL 4315903. But see Sean Somerville, *Coalition Promotes Rules for Web Sales; Six U.S. Companies Join Effort To Boost Consumer Confidence*, Balt. Sun, Sept. 2, 1999, at 1C, available at 1999 WL 5201342 (noting that Consumer Reports has not detailed more online fraud than in retail businesses).

complaints each month³⁰⁰ and expects this amount to grow,³⁰¹ straining its resources.³⁰² Presently, the FTC has entered into eight consent decrees,³⁰³ filed more than 58 enforcement actions, helped in over 374 prosecutions,³⁰⁴ conducted more than 11 major Internet sweeps³⁰⁵ and estimated US e-consumer damages to be more than \$747 million.³⁰⁶ Yet, even these numbers pale to the 700% rise³⁰⁷ in e-consumer complaints that the National Fraud Information Center,³⁰⁸ Consumers International³⁰⁹ and the Better Business Bureau³¹⁰ have received from e-consumers. While representing 3% of commercial activity, e-commerce activity represents 40%

³⁰⁰ The FTC on 'Internet Fraud' Before the Subcommittee on Investigations of the Gov'tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 28 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

³⁰¹ *Id.*

³⁰² *Id.* at 29.

³⁰³ Ilene Knable Gotts, et al., *Dev.s in Consumer Protection: Enforcers Get Tough on Fraudulent and Deceptive Practices in Telecommunications Services*, 11-SUM Antitrust 39, 40 (1997).

³⁰⁴ Robert MacMillan, *US Will Follow Web Sales And Pursue Self-Regulation*, Newsbytes, Feb. 5, 1999 (Pg. Unavail. Online) at ¶ 17-8, available at 1999 WL 5118700; see The FTC on 'Internet Fraud' Before the Subcommittee on Investigations of the Gov'tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 11 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; Prepared Statement of the FTC on 'Consumer Protection in Cyberspace Combating Fraud on the Internet' Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Comm. on Commerce United States House of Representatives, Washington, D.C. June 25, 1998, at II (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; White House, *A Framework for Global Elec. Commerce*, at ¶ 3 (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/framework.htm>>; Robert MacMillan, *FTC Plans Ecom Safety Workshop*, Newsbytes, Dec. 14, 1998 (Pg. Unavail. Online), available at 1998 WL 20720237; see also Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 9 (1999) (noting that the FTC addresses fraudulent deceptive business practices by suing businesses in federal court).

³⁰⁵ White House, *A Framework for Global Elec. Commerce*, at ¶ 5 (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/framework.htm>>.

³⁰⁶ *Id.*

³⁰⁷ Bobby McGill, *Fraud Watchers Patrol Internet Resources Help Consumers Avoid Online Problems*, Ariz. Republic, Aug. 8, 1999, at D4, available at 1999 WL 4191106.

³⁰⁸ Steve Johnson, *Promotion by Cal. Ecom Co. Onsale under Investigation*, Knight-Ridder Trib. Bus. News, Apr. 28, 1999 (Pg. Unavail. Online) at ¶ 7, available at 1999 WL 17333724.

³⁰⁹ Valerie Lawton, *Barbie Lawsuit Shows Ecom Pitfalls Consumer Groups Push For Shopper Protection on Net*, Toronto Star, Oct. 12, 1998, at C1, at ¶ 2, available at 1998 WL 30667931.

³¹⁰ Bobby McGill, *Fraud Watchers Patrol Internet Resources Help Consumers Avoid Online Problems*, Ariz. Republic, Aug. 8, 1999, at D4, available at 1999 WL 4191106.

of all consumer complaints.³¹¹ Most complaints involve sums like “a \$50 sweater,”³¹² and e-consumers are left with either paying more money to assert their rights or letting defrauders go free.³¹³ With “[c]omplaints [] mounting”³¹⁴ and “horror stor[ies]”³¹⁵ continuing, the US has done little to help e-consumers.³¹⁶

For the most part, the FTC has uncovered old-fashioned scams³¹⁷ dressed up in high-tech garb,³¹⁸ and has generally found that it has adequate statutory authority to investigate and prosecute defendants engaged in illegal practices online,” the White House report said.³¹⁹

c) *FTC Cyber-Crime Actions and Past Regulatory Act.*

The majority of actions the FTC brings are based upon violations of § 5 of the FTC Act,³²⁰ prohibiting “unfair or deceptive acts or practices”³²¹ in interstate commerce. The varied³²²

³¹¹ *Id.*; see *Making the Most of the Net Medium*, CNET News.com, (last visited Jan. 20, 1999) <<http://www.news.com/Perspectives/Column/0,176,392,00.html?st.ne.per.idx.colpast>>.

³¹² Bobby McGill, *Fraud Watchers Patrol Internet Resources Help Consumers Avoid Online Problems*, Ariz. Republic, Aug. 8, 1999, at D4, available at 1999 WL 4191106, at ¶ 7.

³¹³ See Valerie Lawton, *Barbie Lawsuit Shows Ecom Pitfalls Consumer Groups Push For Shopper Protection on Net*, Toronto Star, Oct. 12, 1998, at C1, at ¶ 8, available at 1998 WL 30667931.

³¹⁴ *Id.* at ¶ 2.

³¹⁵ *Consumer Groups Take OECD to Task on Net Protection*, The Edmonton Sun, Oct. 8, 1998 (Pg. Unavail. Online), available at 1998 WL 19790597.

³¹⁶ Valerie Lawton, *Barbie Lawsuit Shows Ecom Pitfalls Consumer Groups Push For Shopper Protection on Net*, Toronto Star, Oct. 12, 1998, at C1, at ¶ 3, available at 1998 WL 30667931.

³¹⁷ Prepared Statement of the FTC on ‘Consumer Protection in Cyberspace Combating Fraud on the Internet’ Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Comm. on Commerce United States House of Representatives, Washington, D.C. June 25, 1998, at II (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

³¹⁸ The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 11 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

³¹⁹ Robert MacMillan, *FTC Plans Ecom Safety Workshop*, Newsbytes, Dec. 14, 1998 (Pg. Unavail. Online), available at 1998 WL 20720237.

³²⁰ Note, a business, that deceptively represents, omits, or acts in a way likely to mislead Consumers, under reasonable circumstances, in a material way that likely affects their decision or conduct regarding a product or service marketed, will violate §5. Businesses are responsible for explicit or un-implied violations, whether or not those claims are intended. The failure to disclose the truth is a “deceptive omission.” See The Consumer Protection Pyramid: Education, Self-Regulation, and Law Enforcement, Prepared Remarks of Comm’r Roscoe B. Starek, III FTC Before the Korea Consumer Festival ‘97 Seoul, Republic of Korea Dec. 2, 1997, at ¶ 13 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

³²¹ See Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 9 (1999).

practices consist of refined tactics³²³ such as fraudulent or unlicensed professional services,³²⁴ pyramid schemes,³²⁵ exploitative “work-at-home business opportunities,”³²⁶ diet scams,³²⁷ “scientific breakthroughs,”³²⁸ scholarship scams,³²⁹ dangerous medical products,³³⁰ “lottery ticket scams”³³¹ and “pump and dump” stock manipulation schemes.³³² In response, the FTC has

³²² See Robert MacMillan, *FTC Plans Ecom Safety Workshop*, Newsbytes, Dec. 14, 1998 (Pg. Unavail. Online), available at 1998 WL 20720237.

³²³ Dee Pridgen, *How Will Consumers Be Protected on the Info. Superhighway?*, 32 Land & Water L. Rev. 237, 244, 248 (1997).

³²⁴ See J. Marc Chittum, U.S. Dep’t of Commerce, *Knowledge Transfer Redefined Through Elec. Commerce* (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/27.htm>>.

³²⁵ Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 3 (1999); John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 903-6 (Summer 1999); Robert MacMillan, *FTC Plans Ecom Safety Workshop*, Newsbytes, Dec. 14, 1998 (Pg. Unavail. Online), available at 1998 WL 20720237, at * 12; see also Ilene Knable Gotts, et al., *Dev.s in Consumer Protection: Enforcers Get Tough on Fraudulent and Deceptive Practices in Telecommunications Services*, 11-SUM Antitrust 39 (1997) (stating that the Internet provides increased opportunities for improper activities, misleading consumers by various deceptive devices).

³²⁶ Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 3 (1999); see also Ilene Knable Gotts, et al., *Dev.s in Consumer Protection: Enforcers Get Tough on Fraudulent and Deceptive Practices in Telecommunications Services*, 11-SUM Antitrust 39 (1997) (stating that the Internet provides increased opportunities for improper activities, misleading consumers by various deceptive devices).

³²⁷ Robert MacMillan, *FTC Plans Ecom Safety Workshop*, Newsbytes, Dec. 14, 1998 (Pg. Unavail. Online), available at 1998 WL 20720237, at * 13.

³²⁸ *Id.* at * 27.

³²⁹ *Id.* at * 30.

³³⁰ Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 3 (1999); see also Ilene Knable Gotts, et al., *Dev.s in Consumer Protection: Enforcers Get Tough on Fraudulent and Deceptive Practices in Telecommunications Services*, 11-SUM Antitrust 39 (1997) (stating that the Internet provides increased opportunities for improper activities, misleading consumers by various deceptive devices).

³³¹ Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 3 (1999); see also Ilene Knable Gotts, et al., *Dev.s in Consumer Protection: Enforcers Get Tough on Fraudulent and Deceptive Practices in Telecommunications Services*, 11-SUM Antitrust 39 (1997) (stating that the Internet provides increased opportunities for improper activities, misleading consumers by various deceptive devices).

³³² Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 3, 9 (1999); see John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 906 (Summer 1999); see also Ilene Knable Gotts, et al., *Dev.s in Consumer Protection: Enforcers Get Tough on Fraudulent and Deceptive Practices in Telecommunications Services*, 11-SUM Antitrust 39 (1997) (stating that the Internet provides increased opportunities for improper activities, misleading consumers by various deceptive devices).

taken the “offensive” by creating a nation-wide fraud database to make enforcement easier.³³³ Further, the FTC coordinates domestic³³⁴ and international³³⁵ “Surf Days”³³⁶ to notify questionable e-businesses of their cyberlaw violations.³³⁷

While some e-business webpages offer the e-consumer efficient access to “top brand-name consumer products”³³⁸ at “low-price[s],”³³⁹ others proffer claims to convince the naïve and knowledgeable e-consumer³⁴⁰ alike to buy or sell³⁴¹ or fraudulently attach name brands to fool consumers into purchasing from a scam site instead of the actual business.³⁴² On-line auctions, large billion-dollar³⁴³ “garage sells,”³⁴⁴ represent 60% of e-consumer complaints.³⁴⁵ With fraud potential high,³⁴⁶ many times e-consumers “either don't receive anything or don't receive the

³³³ Bill Pietrucha, *FTC Says Fraud Could Slow Ecom Growth*, Newsbytes, June 26, 1998 (Pg. Unavail. Online), available at 1998 WL 11723668, at * ¶¶ 7-8.

³³⁴ See The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 24 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

³³⁵ See *id*; see also Robert MacMillan, *FTC Plans Ecom Safety Workshop*, Newsbytes, Dec. 14, 1998 (Pg. Unavail. Online), available at 1998 WL 20720237, at * 15-6 (describing FTC Int’l surf days).

³³⁶ The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶¶ 24, 25 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

³³⁷ Robert MacMillan, *FTC Plans Ecom Safety Workshop*, Newsbytes, Dec. 14, 1998 (Pg. Unavail. Online), available at 1998 WL 20720237, at * 14.

³³⁸ *Am. Interactive Media and Shopping.com Announce Strategic Mktng Agreement*, PR Newswire, Jan. 27, 1999.

³³⁹ *Id*.

³⁴⁰ See Aaron Schavey, U.S. Dep’t of Commerce, *Today's Promise and Tomorrow's Opportunity*, at ¶ 3 (last visited Sept. 12, 1999) <<http://www.doc.gov>>.

³⁴¹ Dee Pridgen, *How Will Consumers Be Protected on the Info. Superhighway?*, 32 Land & Water L. Rev. 237, 242 (1997).

³⁴² See Lauren Coleman-Lochner, *Retail Scams Lurk Among Cybershopping Sites*, Austin Am.-Statesman, Jan. 19, 1999, at D2, at ¶ 13, available at 1999 WL 7400043.

³⁴³ *Going, Going, Virtually Gone: The Success of Online Auctions in the US Such as eBay has Prompted the Rise of Eur. Auctioneers Who Want to Emulate its Model*, Bus. & Fin., June 17, 1999 (Pg. Unavail. Online), ¶ 2, available at 1999 WL 9925711.

³⁴⁴ Gina Smith, *Will Shopping Malls be Going, Going, Gone?*, S.F. Examiner, Oct. 11, 1998, at C5, available at 1998 WL 5192456.

³⁴⁵ *Consumer Groups Take OECD to Task on Net Protection*, The Edmonton Sun, Oct. 8, 1998 (Pg. Unavail. Online), available at 1998 WL 19790597.

³⁴⁶ See *Going, Going, Virtually Gone: The Success of Online Auctions in the US Such as eBay has Prompted the Rise of Eur. Auctioneers Who Want to Emulate its Model*, Bus. & Fin., June 17, 1999 (Pg. Unavail. Online) at ¶ 10, available at 1999 WL 9925711.

right goods.”³⁴⁷ In *FTC v. Hare*, the FTC sued an e-business for selling personal computers while failing to deliver the computers or grant refunds.³⁴⁸ Yet, “despite the potential fraud and false bids,”³⁴⁹ on-line auctions steadily increase in profits and make “European auctioneers ... want to emulate its model.”³⁵⁰ E-consumer complaints about airline and travel fraud have risen 600%,³⁵¹ falling into “special offers”³⁵² and “false travel deals,”³⁵³ and have forced travel organizations to admit that the e-consumer should be skeptical³⁵⁴ in this “unregulated environment.”³⁵⁵ While pharmaceutical e-businesses benefit many,³⁵⁶ many distributors fail³⁵⁷ to review medical

³⁴⁷ *Consumer Groups Take OECD to Task on Net Protection*, The Edmonton Sun, Oct. 8, 1998 (Pg. Unavail. Online), available at 1998 WL 19790597; see *Cyberspace: Who Will Make the Rules? Commerce's William Daley on Privacy and Taxes*, Bus. Wk., Mar. 22, 1999, at 30D, ¶ 1, available at 1999 WL 8226544; *Going, Going, Virtually Gone: The Success of Online Auctions in the US Such as eBay has Prompted the Rise of Eur. Auctioneers Who Want to Emulate its Model*, Bus. & Fin., June 17, 1999 (Pg. Unavail. Online) at ¶ 5, available at 1999 WL 9925711; Valerie Lawton, *Barbie Lawsuit Shows Ecom Pitfalls Consumer Groups Push For Shopper Protection on Net*, Toronto Star, Oct. 12, 1998, at C1, at ¶¶ 3, 5, available at 1998 WL 30667931; see also Prepared Statement of the FTC on ‘Consumer Protection in Cyberspace Combating Fraud on the Internet’ Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Comm. on Commerce United States House of Representatives, Washington, D.C. June 25, 1998, at II, C (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; Gina Smith, *Will Shopping Malls be Going, Going, Gone?*, S.F. Examiner, Oct. 11, 1998, at C5, available at 1998 WL 5192456 (noting a recent FTC list of online auction “rip-offs” for e-consumers).

³⁴⁸ Prepared Statement of the FTC on ‘Consumer Protection in Cyberspace Combating Fraud on the Internet’ Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Comm. on Commerce United States House of Representatives, Washington, D.C. June 25, 1998, at II C (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; see *Going, Going, Virtually Gone: The Success of Online Auctions in the US Such as eBay has Prompted the Rise of Eur. Auctioneers Who Want to Emulate its Model*, Bus. & Fin., June 17, 1999 (Pg. Unavail. Online) at ¶ 5, available at 1999 WL 9925711 (noting a government conviction of an on-line auction fraud).

³⁴⁹ *Going, Going, Virtually Gone: The Success of Online Auctions in the US Such as eBay has Prompted the Rise of Eur. Auctioneers Who Want to Emulate its Model*, Bus. & Fin., June 17, 1999 (Pg. Unavail. Online) at ¶ 6, available at 1999 WL 9925711.

³⁵⁰ *Id.* at ¶ 1.

³⁵¹ Barbara Shea, *How to Avoid Bumpy Ride into Travel Cyberspace; Fraud: Some Quick Advice For Dealing With the Slick Operators*, The Baltimore Sun, June 6, 1999, at 5R, available at 1999 WL 5191185.

³⁵² David Bear, *Skepticism Online Travel Deals on the Internet Require Cyber-Cynicism*, Pitt. Post-Gazette, Mar. 28, 1999, at E2, at ¶ 7, available at 1999 WL 5264776.

³⁵³ *Id.*

³⁵⁴ David Bear, *Skepticism Online Travel Deals on the Internet Require Cyber-Cynicism*, Pitt. Post-Gazette, Mar. 28, 1999, at E2, at ¶ 4, available at 1999 WL 5264776.

³⁵⁵ *Id.* at ¶ 5.

³⁵⁶ See Oversight Hearing Drugstores on the Net: The Benefits and Risks of On-line Pharmacies, Subcommittee on Oversight & Investigations, 1999 WL 20010889, at * ¶ 26 (July 30, 1999) (statement of Mr. Ivan K. Fong, United States Dep’t of Justice); Carl T. Hall, *FTC Wants to Regulate Online Pharmacies*, S.F. Chron., July

prescriptions³⁵⁸ or to troubleshoot overdosing dangers and medicinal conflicts.³⁵⁹ The effect is that “miracle” tonics,³⁶⁰ HIV “home test kits,”³⁶¹ AIDS “cures,”³⁶² wild promotions,³⁶³ illegally obtained Viagra³⁶⁴ or GHB,³⁶⁵ illegal drug importation,³⁶⁶ “mood-enhancing herbal products”³⁶⁷ and dangerous abortion kits³⁶⁸ reach e-consumers and call for federal crackdowns³⁶⁹ on Internet purchases.³⁷⁰ Such activity makes e-consumers “uncomfortable”³⁷¹ with e-commerce – thus threatening growth.³⁷²

31, 1999, at A2, available at 1999 WL 2692371.

³⁵⁷ See Janet Woodcock, Dr., *Online Pharmacies*, 1999 WL 20010890, at * ¶ 23 (July 30, 1999) (Pg. Unavail. Online).

³⁵⁸ Carl T. Hall, *FTC Wants to Regulate Online Pharmacies*, S.F. Chron., July 31, 1999, at A2, available at 1999 WL 2692371.

³⁵⁹ See *id.*

³⁶⁰ *Id.*

³⁶¹ Janet Woodcock, Dr., *Online Pharmacies*, 1999 WL 20010890, at * ¶ 32 (July 30, 1999) (Pg. Unavail. Online).

³⁶² Carl T. Hall, *FTC Wants to Regulate Online Pharmacies*, S.F. Chron., July 31, 1999, at A2, available at 1999 WL 2692371.

³⁶³ *Id.*; see also Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887, 892-3 (Summer 1998) (discussing Internet mass marketing of drugs).

³⁶⁴ See Carl T. Hall, *FTC Wants to Regulate Online Pharmacies*, S.F. Chron., July 31, 1999, at A2, available at 1999 WL 2692371.

³⁶⁵ See Janet Woodcock, Dr., *Online Pharmacies*, 1999 WL 20010890, at * ¶¶ 24, 33 (July 30, 1999) (Pg. Unavail. Online).

³⁶⁶ See *id.* at * ¶34.

³⁶⁷ John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 906 (Summer 1999).

³⁶⁸ *Id.*

³⁶⁹ See Oversight Hearing Drugstores on the Net: The Benefits and Risks of On-line Pharmacies, Subcommittee on Oversight & Investigations, 1999 WL 20010889, at § 1, 5, at ¶ 22 (July 30, 1999) (statement of Mr. Ivan K. Fong, United States Dep’t of Justice) July 30, 1999) (statement of Mr. Ivan K. Fong, United States Dep’t of Justice); see also Janet Woodcock, Dr., *Online Pharmacies*, 1999 WL 20010890, at * ¶¶ 26, 35-7 (July 30, 1999) (Pg. Unavail. Online) (discussing dangers of Internet sales of home abortion kits).

³⁷⁰ See Carl T. Hall, *FTC Wants to Regulate Online Pharmacies*, S.F. Chron., July 31, 1999, at A2, available at 1999 WL 2692371.

³⁷¹ *Commerce Dep’t to Publish Internet Sales Figures*, L.A. Times, Feb. 6, 1999, at C2, available at 1999 WL 2127347.

³⁷² See *Cyberspace: Who Will Make the Rules? Commerce’s William Daley on Privacy and Taxes*, Bus. Wk., Mar. 22, 1999, at 30D, at ¶ 2, available at 1999 WL 8226544; see also *The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate*, Washington, D.C. Feb. 10, 1998, at ¶ 6 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

In short, the FTC actions initiate with a slap on the wrist and then become the 300-pound full authority of a governmental agency.

To remedy these matters, the FTC does have “broad” authority over US e-commerce³⁷³ to proscribe commercial “deception and unfairness”³⁷⁴ to “promote vigorous competition”³⁷⁵ or practices “likely to cause substantial injury” to consumers³⁷⁶—the consumer being only incidental. The FTC may require corrective advertising,³⁷⁷ disclosures, consumer notices, “issue administrative complaints and conduct administrative adjudications,”³⁷⁸ file a federal suit to obtain preliminary and permanent injunctive relief, redress for injured consumers, “disgorgement of ill-gotten

³⁷³ The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 1 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; see Prepared Statement of the FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm., United States Senate, 1998 WL 12762604, at ¶¶ 3, 6 (Feb. 10, 1998) (Pg. Unavail. Online) (statement of Robert Pitofsky).

³⁷⁴ The Consumer Protection Pyramid: Education, Self-Regulation, and Law Enforcement Prepared Remarks of Comm’r Roscoe B. Starek, III FTC Before the Korea Consumer Festival ‘97 Seoul, Republic of Korea Dec. 2, 1997, at ¶ 13 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; see also Prepared Statement of the FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm., United States Senate, 1998 WL 12762604, at * ¶ 3 (Feb. 10, 1998) (Pg. Unavail. Online) (statement of Robert Pitofsky): Detailing that the FTC acts in the marketplace by protecting consumers from unfair and deceptive business practices under “15 U.S.C. 45 (a). The Comm’n also has responsibilities under approximately thirty additional statutes, e.g., the Clayton Act, 15 U.S. C. 12, which prohibits various anticompetitive practices; the Truth in Lending Act, 15 U.S.C. 1601 et seq., which mandates disclosures of credit terms; the Fair Credit Billing Act, 15 U.S. C. 1666 et seq., which provides for the correction of billing errors on credit accounts; and the Fair Credit Reporting Act, 15 U.S. C. 1681 et seq., which establishes rights with respect to consumer credit reports. The Comm’n also enforces over 35 rules governing specific industries and practices .e.g. the Used Car Rule, 16 C.F.R. Part 455, which requires used car dealers to disclose warranty terms via a window sticker; the Franchise Rule, 16 C.F.R. Part 436, which requires the provision of information to prospective franchisees; and the Telemarketing Sales Rule, 16 C - F. R. Part 310, which defines and prohibits deceptive telemarketing practices and other abusive telemarketing practices.”

³⁷⁵ Prepared Statement of the FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm., United States Senate, 1998 WL 12762604, at * ¶ 3 (Feb. 10, 1998) (Pg. Unavail. Online) (statement of Robert Pitofsky).

³⁷⁶ The Consumer Protection Pyramid: Education, Self-Regulation, and Law Enforcement Prepared Remarks of Comm’r Roscoe B. Starek, III FTC Before the Korea Consumer Festival ‘97 Seoul, Republic of Korea Dec. 2, 1997, at ¶ 17 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

³⁷⁷ *Id.* at ¶ 29.

³⁷⁸ Prepared Statement of the FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm., United States Senate, 1998 WL 12762604, at * ¶ 11 (Feb. 10, 1998) (Pg. Unavail. Online) (statement of Robert Pitofsky); see also The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 10 (last visited Sept. 12, 1999) <<http://www.ftc.gov>> (noting that the FTC “can issue administrative complaints and conduct administrative adjudications that may result in the issuance of cease and desist orders against practices found to be unfair or deceptive”).

gains”³⁷⁹ or seek Department of Justice action for criminal filings or egregious fraud cases.³⁸⁰ In *FTC v. Fortuna Alliance*, the FTC forced perpetrators to repatriate foreign assets and accounts³⁸¹ from a pyramid scheme involving 8,600 members.³⁸² Foregoing sanctions, the court ordered

³⁷⁹ Prepared Statement of the FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm., United States Senate, 1998 WL 12762604, at * ¶ 11 (Feb. 10, 1998) (Pg. Unavail. Online) (statement of Robert Pitofsky); *see also* The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 10 (last visited Sept. 12, 1999) <<http://www.ftc.gov>> (noting that the FTC can file directly in federal district court to obtain preliminary or permanent injunctive relief); Prepared Statement of the FTC on ‘Consumer Protection in Cyberspace Combating Fraud on the Internet’ Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Comm. on Commerce United States House of Representatives, Washington, D.C. June 25, 1998, at II (last visited Sept. 12, 1999) <<http://www.ftc.gov>> (noting that the FTC may request Attorney General action in a particular matter or may file a suit in federal court if the Attorney General’s office declines to act).

³⁸⁰ The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 10 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; *see also* Prepared Statement of the FTC on ‘Consumer Protection in Cyberspace Combating Fraud on the Internet’ Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Comm. on Commerce United States House of Representatives, Washington, D.C. June 25, 1998, at ¶ II (last visited Sept. 12, 1999) <<http://www.ftc.gov>> (noting that the FTC may Seek assistance from Dep’t of Justice to file criminal proceedings against parties who violate court orders or in “egregious fraud cases”).

³⁸¹ *See* The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 11 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; Prepared Statement of the FTC on ‘Consumer Protection in Cyberspace Combating Fraud on the Internet’ Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Comm. on Commerce United States House of Representatives, Washington, D.C. June 25, 1998, at II(A)(1) (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; *see also* Ilene Knable Gotts, et al., *Dev.s in Consumer Protection: Enforcers Get Tough on Fraudulent and Deceptive Practices in Telecommunications Services*, 11-SUM Antitrust 39, 41 (1997) (noting that the FTC agreed to settle case for \$2.8 million in “consumer redress”).

³⁸² *See* The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 11 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; Prepared Statement of the FTC on ‘Consumer Protection in Cyberspace Combating Fraud on the Internet’ Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Comm. on Commerce United States House of Representatives, Washington, D.C. June 25, 1998, at II(A)(1) (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 11 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; Ilene Knable Gotts, et al., *Dev.s in Consumer Protection: Enforcers Get Tough on Fraudulent and Deceptive Practices in Telecommunications Services*, 11-SUM Antitrust 39, 41 (1997).

Fortuna to refund monies to its “members,”³⁸³ with the FTC finally obtaining \$2.8 million in redress.³⁸⁴ In *FTC v. Nia Cano d/b/a Credit Development Int'l & Drivers Seat Network*,³⁸⁵ the FTC acted to freeze over \$2 million in CDI's assets and appoint a receiver over the business.³⁸⁶ In *FTC v. Rocky Mountain International Silver and Gold, Inc.*,³⁸⁷ the court froze RMI's assets after accepting the FTC's argument that RMI's was a pyramid scheme. In *FTC v. JewelWay International, Inc.*,³⁸⁸ the FTC charged six parties with “deceptive earnings claims.”³⁸⁹ With no way to prove real profits, the FTC settled with the parties for \$5 million.³⁹⁰ In *FTC v. William B. Chappie*,³⁹¹ the FTC charged defendants³⁹² with deceptively inflating potential sales for computer software distributorships and settled when the defendants agreed to remedy those harmed.³⁹³ In the *Field of Schemes* Investment Fraud Sweep, the FTC stopped “over \$150 million in fraudulent sales from offerings ranging from gold-silver mines [and movie production³⁹⁴] to Internet ‘virtual shopping malls.’”³⁹⁵ In *Intellicom Services, Inc.*, the FTC charged twenty-two parties for fraudulently inflating various Internet businesses' profits” leading to \$30 million in damages.³⁹⁶ Working with the California Department of Corporations, the FTC filed suit, froze assets and obtained preliminary

³⁸³ The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 11 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

³⁸⁴ See Ilene Knable Gotts, et al., *Dev.s in Consumer Protection: Enforcers Get Tough on Fraudulent and Deceptive Practices in Telecommunications Services*, 11-SUM Antitrust 39, 41 (1997).

³⁸⁵ *FTC v. Nia Cano d/b/a Credit Dev. Int'l & Drivers Seat Network*, No. 97-7947 IH (AJWx) (C.D. Cal. filed Oct. 29, 1997).

³⁸⁶ See The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 11 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; Robert MacMillan, *FTC Plans Ecom Safety Workshop*, Newsbytes, Dec. 14, 1998 (Pg. Unavail. Online) at 13, available at 1998 WL 20720237.

³⁸⁷ See Robert MacMillan, *FTC Plans Ecom Safety Workshop*, Newsbytes, Dec. 14, 1998 (Pg. Unavail. Online) at ¶ 12, available at 1998 WL 20720237.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ See *id.*

³⁹¹ *FTC v. William B. Chappie*, Civ. No. 96-6671-CIV at (S.D. Fla. complaint filed June 24, 1996).

³⁹² Ilene Knable Gotts, et al., *Dev.s in Consumer Protection: Enforcers Get Tough on Fraudulent and Deceptive Practices in Telecommunications Services*, 11-SUM Antitrust 39, 41 (1997).

³⁹³ See *id.*

³⁹⁴ Robert MacMillan, *FTC Plans Ecom Safety Workshop*, Newsbytes, Dec. 14, 1998 (Pg. Unavail. Online), available at 1998 WL 20720237, at ¶ 10.

³⁹⁵ *Id.* at *26.

³⁹⁶ Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 10 (1999).

relief.³⁹⁷ Lastly, in *FTC v. Audiotex Connection*, the FTC filed suit against defendants who used e-consumers' computers³⁹⁸ to charge exorbitant international phone charges³⁹⁹ to the e-consumers' accounts. The FTC obtained 100 percent compensation for over 38,000 harmed e-consumers.⁴⁰⁰

With these numerous tools,⁴⁰¹ one would think that the FTC would utilize its power to affect the e-consumer and e-business negotiating relationship with EU e-consumer-like regulations. The FTC has regulated various sectors of US commerce before with success.⁴⁰² "In the past, as new marketing media came into existence, the FTC promulgated consumer protection regulations specific to that medium."⁴⁰³ The FTC has regulated door-to-door sales, mail order catalogue sales, 1-900-numbers and telemarketing.⁴⁰⁴ In many, the FTC allowed the consumer a similar "cooling-off" period like in EU regulations and directives.⁴⁰⁵ The FTC has required purchases to be delivered "within a reasonable time"⁴⁰⁶ and has required contractual transparency before incurring 1-900 telephone charges.⁴⁰⁷ The FTC applied these consumer-friendly regula-

³⁹⁷ See *id.*

³⁹⁸ Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 9 (1999); see The FTC on 'Internet Fraud' Before the Subcommittee on Investigations of the Gov'tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 14 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

³⁹⁹ Ben Goodger, *Cyberspace – Evaluating What Laws to Follow and How to Limit the Risk of Unintentionally Violating Foreign Laws*, 564 PLI/Pat 321, 9 (1999).

⁴⁰⁰ *Id.*

⁴⁰¹ See Prepared Statement of the FTC on 'Consumer Protection in Cyberspace Combating Fraud on the Internet' Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Comm. on Commerce United States House of Representatives, Washington, D.C. June 25, 1998, at II (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

⁴⁰² The FTC on 'Internet Fraud' Before the Subcommittee on Investigations of the Gov'tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

⁴⁰³ Dee Pridgen, *How Will Consumers Be Protected on the Info. Superhighway?*, 32 Land & Water L. Rev. 237, 251-2 (1997).

⁴⁰⁴ Prepared Statement of the FTC on 'Consumer Protection in Cyberspace Combating Fraud on the Internet' Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Comm. on Commerce United States House of Representatives, Washington, D.C. June 25, 1998, at I(B)(2) (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

⁴⁰⁵ Dee Pridgen, *How Will Consumers Be Protected on the Info. Superhighway?*, 32 Land & Water L. Rev. 237, 251-2 (1997).

⁴⁰⁶ *Id.*

⁴⁰⁷ Prepared Statement of the FTC on 'Consumer Protection in Cyberspace Combating Fraud on the Internet' Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Comm. on Commerce United States House of Representatives, Washington, D.C. June 25, 1998, at I(B)(2) (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

tions to lucrative commercial sectors that became important to the national economy⁴⁰⁸ and that had a propensity to degrade overall consumer confidence.⁴⁰⁹ However, because of the US's present Internet policy to foster e-commerce, any FTC application of these past remedies to present e-commerce activity will probably not occur.⁴¹⁰

C. Convergence

Because the Internet is a global medium, the U.S. cannot regulate it alone. Are our cyber-policies clashing with those of other countries? ... Their [the EU's] philosophy is: Unless a company meets their restrictive [] laws, it cannot transfer data and information over the Internet. ... [If there's a violation,] they can shut down your site. That could have a very, very chilling effect on the transfer of data between Europe and the U.S.⁴¹¹

With EU and US policymakers conflicting on how e-commerce should be fostered,⁴¹² globalized e-commerce requires that each come to some understanding in order for e-commerce to continue to develop at the present rapid pace⁴¹³ with a legalized structure. To achieve this, this paper advocates a *good faith* convergence of EU and US e-consumer interests to form a globalized⁴¹⁴ governmentally-enforced self-regulatory mechanism⁴¹⁵ that incorporates flexibility

⁴⁰⁸ Dee Pridgen, *How Will Consumers Be Protected on the Info. Superhighway?*, 32 Land & Water L. Rev. 237, 252-3 (1997).

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Cyberspace: Who Will Make the Rules? Commerce's William Daley on Privacy and Taxes*, Bus. Wk., Mar. 22, 1999, at 30D, at ¶ 14, available at 1999 WL 8226544.

⁴¹² Legal Advisory Board Legal Advisory Board, *.News*, at § 2.2.2(5) (last visited Sept. 12, 1999) <<http://www2.echo.lu/legal/en/lab/971006/minutes-text.html#21>>.

⁴¹³ Charles R. Topping, *The Surf is Up, But Who Owns the Beach? – Who Should Regulate Commerce on the Internet?*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 179 (1999); see John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 943-4, 953 (Summer 1999); Kara Swisher, *Seller Beware: Consumers aren't the only ones who risk being swindled online*, Wall St. J., Dec. 7, 1998, at R22, at ¶ 13, available at 1998 WL-WSJ 18994619.

⁴¹⁴ See Opinion of the Economic and Social Comm. on the 'Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions: A Eur. Initiative in Elec. Commerce, 1998 O.J. (C 019) at 72, § II(1.2); *Elec. Commerce: Comm'n Presents Framework for Future Action*, RAPID, Apr. 16, 1997, at Press Release: IP: 97/313, at ¶¶ 1, 7(2); see also Resolution on the Communication From the Comm'n on Globalisation and the Info. Soc'y: The Need for Strengthened Int'l Coordination (COM(98)0050 C4- 0153/98), 1999 O.J. (C 104) at 128, §§ 4, 4(a), 4(b), 4(f) (making recommendations to the commission regarding information society globalization taking the form of an Int'l Internet Charter, noting that consumer protection should be ensured, and stating that any international agreement should not "subvert" Eur. public interest principles – consumer protection laws).

⁴¹⁵ See Resolution on the Communication from the Comm'n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions on a Eur. Initiative in Elec. Commerce (COM(97)0157 - C4-0297/97), 1998 O.J. (C 167) at 203, at ¶ 32; Fed. Standards for Internet Privacy: before the U.S. House of

and business practicality, involves consumer organizations in decision-making processes⁴¹⁶ and protects e-consumers in a strong formalistic way.⁴¹⁷ Such a mechanism would balance both concerns by allowing the EU and US to coordinate efforts, rather than “clash,” as “e-commerce [keeps] expanding.”⁴¹⁸ Presently, the US has similar governmentally supported semi-private “public/private partnership[s]” affecting private commercial activity,⁴¹⁹ and, while the EU does not have like agencies, such institutions would work to accelerate EU cohesion and social integration.

Representatives Subcommittee on Telecommunications, Trade and Consumer Protection Elec. Commerce: The Current Status of Privacy Protections for Online Consumers, 1999 WL 20009951 (July 13, 1999) at * ¶¶ 18, 20, 21 (statement of Soveig Singleton, Director of Telecommunications and Technology Studies CATO Institute). *But see* The Consumer Protection Pyramid: Education, Self-Regulation, and Law Enforcement Prepared Remarks of Comm’r Roscoe B. Starek, III FTC Before the Korea Consumer Festival '97 Seoul, Republic of Korea Dec. 2, 1997, at 53 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

⁴¹⁶ Prepared Statement of the FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm., United States Senate, 1998 WL 12762604, * ¶ 9 (Feb. 10, 1998) (Pg. Unavail. Online) (statement of Robert Pitofsky); *see also* Prepared Statement of the FTC on ‘Consumer Protection in Cyberspace Combating Fraud on the Internet’ Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Comm. on Commerce United States House of Representatives, Washington, D.C. June 25, 1998, at I(C)(3) (last visited Sept. 12, 1999) <<http://www.ftc.gov>> (stating that consumer protection most effective when business, government and consumer groups work in coordinated efforts – “all play a role”); John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 951 (Summer 1999) (states that government, business, technological groups and consumers may act to create marketplace governance); Linda Lennard, Chairman of Eur. Info. Soc’y Working Group on Universal Service and Consumer Protection, Senior Policy and Dev. Officer at the Nat’l Consumer Council of the UK (Legal Advisory Board), *Empowering the User: Consumer Protection*, at ¶ 19 (last visited Sept. 12, 1999) <<http://www2.echo.lu/bonn/lennard.html>> (acknowledging a coordinated effort is needed to involve consumer organizations in Internet policy as consumer representative).

⁴¹⁷ *See Create A U.N. Net*, CNET Coverage, (last visited Jan. 20, 2000) <<http://coverage.cnet.com/Content/Features/Dlife/Laws10/ss10.html>>. *Compare* Resolution on the Communication from the Comm’n to the Council, the Eur. Parl., the Economic and Social Comm. and the Comm. of the Regions on a Eur. Initiative in Elec. Commerce (COM(97)0157 - C4-0297/97), 1998 O.J. (C 167) at 203, at ¶ 32.

⁴¹⁸ *Cyberspace Law* (last visited Sept. 12, 1999), <<http://legalnews.findlaw.com/news/19990912/112365640.html>>.

⁴¹⁹ *See* The Consumer Protection Pyramid: Education, Self-Regulation, and Law Enforcement Prepared Remarks of Comm’r Roscoe B. Starek, III FTC Before the Korea Consumer Festival '97 Seoul, Republic of Korea Dec. 2, 1997, at ¶ 47 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; Prepared Statement of the FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm., United States Senate, 1998 WL 12762604, at * ¶ 9 (Feb. 10, 1998) (Pg. Unavail. Online) (statement of Robert Pitofsky); *see also* The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 8 (last visited Sept. 12, 1999) <<http://www.ftc.gov>> (consumer protection occurs when “businesses, government, and consumer groups all play a role”).

I. Governmentally Enforced Self-Regulation Inclusive of Business and Consumer Interests

In some areas, government agreements may prove necessary to facilitate electronic commerce and protect consumers. In these cases, governments should establish a predictable and simple legal environment based on a decentralized, contractual model of law rather than one based on top-down regulation.⁴²⁰

A workable self-regulation mechanism⁴²¹ requires a public/private effort⁴²² where government “encourage[s]”⁴²³ the initiation and adoption of mandatory⁴²⁴ codes-of-conduct⁴²⁵ agreed upon by “competing”⁴²⁶ e-business⁴²⁷ and e-consumer interests.⁴²⁸ While true government

⁴²⁰ White House, *A Framework for Global Elec. Commerce*, at Principle 3 (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/framework.htm>>.

⁴²¹ See The Consumer Protection Pyramid: Education, Self-Regulation, and Law Enforcement Prepared Remarks of Comm’r Roscoe B. Starek, III FTC Before the Korea Consumer Festival '97 Seoul, Republic of Korea Dec. 2, 1997, at ¶ 47 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

⁴²² The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 8 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>; see also John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 974-5 (Summer 1999) (stating that industry should lead to set up a self-regulatory system).

⁴²³ *Id.* at 947; see also Oversight Hearing Drugstores on the Net: The Benefits and Risks of On-line Pharmacies, Subcommittee on Oversight & Investigations, 1999 WL 20010889 at § 1(3) (July 30, 1999) (statement of Mr. Ivan K. Fong, United States Dep’t of Justice) (stating the US government’s belief that self-regulation should occur when possible).

⁴²⁴ John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 947 (Summer 1999).

⁴²⁵ *Id.* at 947, 949, 975; see also Sean Somerville, *Coalition Promotes Rules for Web Sales; Six U.S. Companies Join Effort To Boost Consumer Confidence*, Balt. Sun, Sept. 2, 1999, at 1C, available at 1999 WL 5201342 (stating that Elec. Commerce and Consumer Protection Group will try to standardize Internet rules); Am. Soc’y of Int’l Law, *Eur. Union – United States: Joint Statement on Elec. Commerce*, 37 I.L.M. 667, 668 (1998), available at <<http://www.europa.int>> (stating that self-regulatory codes should be implemented).

⁴²⁶ Valerie Lawton, *Barbie Lawsuit Shows Ecom Pitfalls Consumer Groups Push For Shopper Protection on Net*, Toronto Star, Oct. 12, 1998, at C1, at ¶ 20-1, available at 1998 WL 30667931.

⁴²⁷ *Business Firms Aim to Simplify Law on Internet Buying*, The Plain Dealer Cleveland, Sept. 2, 1999, at 3C, available at 1999 WL 2379616; see also *Cyberspace Law* (last visited Sept. 12, 1999), <<http://legalnews.findlaw.com/news/19990912/112365640.html>> (stating that industry, the Global Business Dialog on Elec. Commerce (GBDe), will address Internet issues such as security, privacy, consumer protection, etc. and that the GBDe includes Microsoft Corp., America Online Inc., and IBM.); Sean Somerville, *Coalition Promotes Rules for Web Sales; Six U.S. Companies Join Effort To Boost Consumer Confidence*, Balt. Sun, Sept. 2, 1999, at 1C, available at 1999 WL 5201342 (stating that major U.S. companies announce they will work with Piper & Marbury LLP to increase consumer confidence on Internet).

⁴²⁸ John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 898 (Sum-

regulations⁴²⁹ might “arrest” e-commerce development,⁴³⁰ be unnecessary⁴³¹ and take time,⁴³² government enforcement⁴³³ of a flexible⁴³⁴ and evolving “community standard,”⁴³⁵ that incorporates e-business and e-consumer interests, has strength. While the private sector should lead,⁴³⁶ government does have an interest in protecting e-consumers’ interests⁴³⁷ and ensuring the incorporation of interests other than “market forces”⁴³⁸ in any mechanism— e-consumer needs and

mer 1999); see also Valerie Lawton, *Barbie Lawsuit Shows Ecom Pitfalls Consumer Groups Push For Shopper Protection on Net*, Toronto Star, Oct. 12, 1998, at C1, at ¶¶ 30-3, available at 1998 WL 30667931 (stating that consumer protections are “urgently” needed).

⁴²⁹ John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 943-4 (Summer 1999).

⁴³⁰ Charles R. Topping, *The Surf is Up, But Who Owns the Beach? – Who Should Regulate Commerce on the Internet?*, 13 Notre Dame J.L. Ethics & Pub. Pol’y 179, 194-5, 202 (1999); see also *Business Firms Aim to Simplify Law on Internet Buying*, The Plain Dealer Cleveland, Sept. 2, 1999, at 3C, available at 1999 WL 2379616 (stating that the business alliance is the “latest industry alliance to try to combat” government Internet regulation); Valerie Lawton, *Barbie Lawsuit Shows Ecom Pitfalls Consumer Groups Push For Shopper Protection on Net*, Toronto Star, Oct. 12, 1998, at C1, ¶¶ 28-9, available at 1998 WL 30667931 (stating that corporate groups are urging governments to stop moves for government regulation); Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887, 899 (Summer 1998) (advocating no new market regulation by government on the Internet).

⁴³¹ Janet Woodcock, Dr., *Online Pharmacies*, 1999 WL 20010890, at * ¶ 5 (July 30, 1999) (Pg. Unavail. Online).

⁴³² White House, *A Framework for Global Elec. Commerce*, at Principle 2(1) (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/framework.htm>>.

⁴³³ See Donna M. Lampert, et al., *Overview of Internet Legal and Regulatory Issues*, 544 PLI/Pat 179, 185 (Dec. 1998); See John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 950-1 (Summer 1999). But see Fed. Standards for Internet Privacy: before the U.S. House of Representatives Subcommittee on Telecommunications, Trade and Consumer Protection Elec. Commerce: The Current Status of Privacy Protections for Online Consumers, 1999 WL 20009951, at * ¶¶ 28-31 (July 13, 1999) (statement of Soveig Singleton, Director of Telecommunications and Technology Studies CATO Institute).

⁴³⁴ Janet Woodcock, Dr., *Online Pharmacies*, 1999 WL 20010890, at * ¶ 5 (July 30, 1999) (Pg. Unavail. Online).

⁴³⁵ Kara Swisher, *Seller Beware: Consumers aren't the only ones who risk being swindled online*, Wall St. J., Dec. 7, 1998, at R22, at ¶ 12, available at 1998 WL-WSJ 18994619.

⁴³⁶ White House, *A Framework for Global Elec. Commerce*, at Principle 1(1) (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/framework.htm>>; see John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 975 (Summer 1999).

⁴³⁷ *Id.* 947, 952-3; see also The FTC on ‘Internet Fraud’ Before the Subcommittee on Investigations of the Gov’tal Affairs Comm. United States Senate, Washington, D.C. Feb. 10, 1998, at ¶ 27 (last visited Sept. 12, 1999) <<http://www.ftc.gov>> (stating that business should not try to mislead consumers for the FTC will act and that the FTC has created a business guide to help businesses sell on the web without fear of prosecution).

⁴³⁸ See John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 943-4 (Summer 1999). But see Fed. Standards for Internet Privacy: before the U.S. House of Representatives Subcommittee on Telecommunications, Trade and Consumer Protection Elec. Commerce: The Current Status

rights.⁴³⁹ With e-commerce data easily attainable from numerous consumer organizations,⁴⁴⁰ it is not difficult for e-businesses or government to address consumer needs or concerns.⁴⁴¹

Another, less exotic, hybrid market governance mechanism consists of the adoption of industry-created codes as law. ... [State] and local building codes typically incorporate industry-created technical standards, effectively elevating such standards to the status of law.⁴⁴²

The US National Advertising Division ["NAD"] of the Council of Better Business Bureaus is an example of a public/private self-regulating mechanism.⁴⁴³ The NAD combines advertising interests to "review" on- and off-line advertising activities, handle disputes and writes and publishes opinions and decisions.⁴⁴⁴ The NAD may submit parties to the FTC for prosecution for deceptive advertising practices.⁴⁴⁵ While the NAD only addresses US advertising concerns, a similar agency could have broadened authority to address EU and US e-commerce concerns. Such an authority ["eAgency"] could require full and easily accessible contract transparency,⁴⁴⁶ ensuring notice of contract terms and conditions, impartial product quality assessments,⁴⁴⁷ e-

of Privacy Protections for Online Consumers, 1999 WL 20009951, at * ¶ 28 (July 13, 1999) (statement of Soveig Singleton, Director of Telecommunications and Technology Studies CATO Institute).

⁴³⁹ Bobby McGill, *Fraud Watchers Patrol Internet Resources Help Consumers Avoid Online Problems*, Ariz. Republic, Aug. 8, 1999, at D4, available at 1999 WL 4191106; see also Valerie Lawton, *Barbie Lawsuit Shows Ecom Pitfalls Consumer Groups Push For Shopper Protection on Net*, Toronto Star, Oct. 12, 1998, at C1, at ¶¶ 22-6, 35-7, available at 1998 WL 30667931 (stating that self-regulators have not always followed through with self-regulation and adherence to their codes of conduct). *But see* John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 947 (Summer 1999) (discussing self-regulation adopting codes of conduct under threat of government action).

⁴⁴⁰ Bobby McGill, *Fraud Watchers Patrol Internet Resources Help Consumers Avoid Online Problems*, Ariz. Republic, Aug. 8, 1999, at D4, available at 1999 WL 4191106; see Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887, 898-9 (Summer 1998).

⁴⁴¹ Kara Swisher, *Seller Beware: Consumers aren't the only ones who risk being swindled online*, Wall St. J., Dec. 7, 1998, at R22, at ¶ 18, available at 1998 WL-WSJ 18994619.

⁴⁴² John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 952 (Summer 1999).

⁴⁴³ See The Consumer Protection Pyramid: Education, Self-Regulation, and Law Enforcement Prepared Remarks of Comm'r Roscoe B. Starek, III FTC Before the Korea Consumer Festival '97 Seoul, Republic of Korea Dec. 2, 1997, at ¶ 48 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

⁴⁴⁴ See *id.*

⁴⁴⁵ The Consumer Protection Pyramid: Education, Self-Regulation, and Law Enforcement Prepared Remarks of Comm'r Roscoe B. Starek, III FTC Before the Korea Consumer Festival '97 Seoul, Republic of Korea Dec. 2, 1997, at 48 (last visited Sept. 12, 1999) <<http://www.ftc.gov>>.

⁴⁴⁶ John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 944-6, 952, 974 (Summer 1999).

⁴⁴⁷ *Id.* at 945.

commerce remedy information⁴⁴⁸ and seller contact information.⁴⁴⁹ Once encouraged,⁴⁵⁰ e-businesses can utilize such readily accessible e-consumer information at almost no cost,⁴⁵¹ and e-consumer power and confidence would increase.⁴⁵² Further, the eAgency could grant administrative remedies or hold alternative dispute resolutions.⁴⁵³ Any e-business's failure to adhere to eAgency's decisions⁴⁵⁴ would result in an appeal to or action by a governmental agency, the FTC⁴⁵⁵ or an agreed upon international body. If innocent, such procedures would protect e-businesses from public stigmatization and unfair e-commerce action.⁴⁵⁶ Yet, government power would legitimize the eAgency's actions and importance as a mandatory self-regulating mechanism.⁴⁵⁷ The effect is simple, government receives assurances that any future regulations can be derived from e-business and e-consumer friendly "customs of dealing" that protect e-consumers from suspicious, wrongful or illegal e-business activity and that allows e-businesses to plan their Internet activity rather than violate eAgency regulations – fairness and foreseeability.⁴⁵⁸

"There's not a good way to check private sellers out, really," she said, adding that she knows of no licensing requirements or regulations governing people selling on the Net.⁴⁵⁹

Once e-business and e-consumer interests within the eAgency create self-regulatory codes, the EU and US could further enforce their adherence by developing browser, cookie, etc.

⁴⁴⁸ Valerie Lawton, *Barbie Lawsuit Shows Ecom Pitfalls Consumer Groups Push For Shopper Protection on Net*, Toronto Star, Oct. 12, 1998, at C1, at ¶¶ 40-4, available at 1998 WL 30667931.

⁴⁴⁹ Lauren Coleman-Lochner, *Retail Scams Lurk Among Cybershopping Sites*, Austin Am.-Statesman, Jan. 19, 1999, at D2, at ¶ 3, available at 1999 WL 7400043.

⁴⁵⁰ Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887, 888 (Summer 1998).

⁴⁵¹ *Id.* at 888, 891-2, 895, 901 (Summer 1998); see John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 975-6 (Summer 1999).

⁴⁵² John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 973-4 (Summer 1999).

⁴⁵³ See Patricia Jacobus, *Where Can Ecom Customers Go to Complain?*, CNET News.com, Dec. 7, 1999 (last visited Jan. 20, 2000) <<http://news.cnet.com/news/0-1007-200-1485107.html?tag=st.cn.1>>; John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 973-4 (Summer 1999).

⁴⁵⁴ *Id.* at 945.

⁴⁵⁵ *Id.* at 976.

⁴⁵⁶ *Id.* at 975-6.

⁴⁵⁷ White House, *A Framework for Global Elec. Commerce*, at Principle 2(2) (last visited Sept. 12, 1999) <<http://www.ecommerce.gov/framework.htm>>.

⁴⁵⁸ Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887, 899-900 (Summer 1998); see Am. Soc'y of Int'l Law, *Eur. Union – United States: Joint Statement on Elec. Commerce*, 37 I.L.M. 667, 667 ¶ ii (1998), available at <<http://www.europa.int>>.

⁴⁵⁹ Lauren Coleman-Lochner, *Retail Scams Lurk Among Cybershopping Sites*, Austin Am.-Statesman, Jan. 19, 1999, at D2, at ¶ 17, available at 1999 WL 7400043.

technology that tracks e-businesses and e-consumers activity and disallows the marketing of goods or services for those businesses that violate the self-regulatory codes or whose rating falls below a certain variable level. ISPs or e-commerce technology could attach location or e-business codes to all e-commerce transmissions such as those already in development for porn, child-porn, child-protection and other normative rating systems.⁴⁶⁰ “On-line shoppers may want to screen out unreliable vendors. Thus, a market might develop for so-called ‘certifying services’ or ‘rating systems.’”⁴⁶¹ Similar certifying systems already exist in Germany, the United Kingdom, China, France, Singapore, Vietnam and Austria, and web-filtering software exists in the US.⁴⁶² While such actions might effect EU or US freedom of speech or contract rights, e-businesses would probably be able to challenge eAgency rating decisions in court or in an administrative proceeding with no loss of due process. Further, any system could be limited in effect to ensure that speech, privacy and fundamental freedom rights are protected. The result is that technology and a pseudo-regulatory structure could coordinate efforts to protect e-consumers from harmful e-commerce activity.

II. Conclusion

In appropriate circumstances, the legal system may adopt rules for the new possibilities.⁴⁶³

We all have to make sure that in running our businesses ... consumer protection is foremost in our minds[.] ... If not, merchants will suffer, consumers will suffer and the government will jump in ways that might be burdensome.⁴⁶⁴

Unlike the EU, the US has feigned away from Internet regulatory measures.⁴⁶⁵ The EU considers any action that it takes as further reinforcing its decisions upon the international realm – policy security,⁴⁶⁶ thus leaving EU law as a default standard for any future international actions. As in the “Joint Agreement Between the US and Europe on Governing Cyberspace”⁴⁶⁷ the EU and US agreed on a “duty-free cyberspace”⁴⁶⁸ and “open dialogue” on Internet govern-

⁴⁶⁰ Dee Pridgen, *How Will Consumers Be Protected on the Info. Superhighway?*, 32 Land & Water L. Rev. 237, 254 (1997).

⁴⁶¹ *Id.*

⁴⁶² John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 932, 932 n.152, 951 (Summer 1999).

⁴⁶³ Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887, 902 (Summer 1998).

⁴⁶⁴ Kara Swisher, *Seller Beware: Consumers aren't the only ones who risk being swindled online*, Wall St. J., Dec. 7, 1998, at R22, at ¶ 26, available at 1998 WL-WSJ 18994619.

⁴⁶⁵ Holly K. Towle, *On-Line: Selected Issues in Contracts*, 557 PLI/Pat 715, 727-8 (Apr. 29-30, 1999).

⁴⁶⁶ *Id.*

⁴⁶⁷ *Info. Soc'y: Comm'n Launches Debate on Virtual World*, Eur. Report, Feb. 4, 1998, at No. 2288, at ¶ 2.

⁴⁶⁸ U.S. Dep't of Commerce, *United States and Eur. Union Reach Agreement On Global Elec. Commerce*, Intro., at ¶ 1 (last visited Sept. 12, 1999) <<http://www.doc.gov/>>.

ance, but nothing much else.⁴⁶⁹ The statement did hint at an increasing US acknowledgment of e-consumer protections,⁴⁷⁰ but effected no changes to the present dearth of e-consumer protections.⁴⁷¹ The effect will be increased tension between EU regulators and US e-businesses.⁴⁷²

While e-commerce will provide “enormous rewards for both consumers and online seller,”⁴⁷³ non-existent US policy and EU regulations will harm future e-commerce growth. These competing visions will result in no e-consumer protection and an inability for e-businesses to stave off litigation. Government, e-business and e-consumers⁴⁷⁴ have an interest in fostering the Internet and ensuring that their voices, interests, needs, concerns and fears are taken into account in any finalized agreement. Without these combined voices, the Internet and e-commerce will become a strangled attempt rather than the true possibilities that exist at the end of the yellow-brick road.

⁴⁶⁹ *Id.* at ¶¶ 2, 3(i), 3(iii); see Mark Owen, *Int'l Ramifications of Doing Business Online: Europe*, 564 PLI/Pat 263, 667 (June 14-15, 1999); Am. Soc'y of Int'l Law, *Eur. Union – United States: Joint Statement on Elec. Commerce*, 37 I.L.M. 667, 667 ¶ i, 668 (1998), available at <<http://www.europa.int>> (advocating a self-regulatory code of conduct, closer cooperation of all market players – even consumer interests, prevention of illegal Internet conduct and a coherent approach toward “trade facilitation”).

⁴⁷⁰ U.S. Dep't of Commerce, *Joint US-Ireland Communiqué*, at ¶ 4(8) (last visited Sept. 12, 1999) <<http://www.doc.gov/ecommerce/irusfnl.htm>>; see Clinton-Hashimoto Statement on Elec. Commerce, 1998 BDIEL AD LEXIS 22, at * ¶ 13 (May 20, 1998).

⁴⁷¹ U.S. Dep't of Commerce, *United States and Eur. Union Reach Agreement On Global Elec. Commerce*, Body, at ¶ 5(i) (last visited Sept. 12, 1999) <<http://www.doc.gov/>>.

⁴⁷² *Info. Soc'y: Comm'n Launches Debate on Virtual World*, Eur. Report, Feb. 4, 1998, at No. 2288, at ¶ 3.

⁴⁷³ John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 988 (Summer 1999).

⁴⁷⁴ *Id.*